87-1918

No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM 1987

TRANS WORLD AIRLINES, INC.,

Petitioner,

—v.—

NATIONAL MEDIATION BOARD, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DEBORAH BOLLER, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is TWA's claim that the National Mediation Board violated the right of the majority of a craft or class of employees under § 2, Fourth of the Railway Labor Act to reject union representation—by deleting the names of 302 eligible employees from the eligibility list for a mail-ballot representation election, after counting the ballots unofficially but before counting them officially, in order to change the outcome of the election from defeat for all three unions on the ballot, to certification of one of them as a representative—subject to judicial review under § 2, Ninth of the Railway Labor Act?

PARTIES

The petitioner is Trans World Airlines, Inc. ("TWA"), a "common carrier by air" within the meaning of the Title II of the Railway Labor Act ("RLA"). TWA has no parent company, and no affiliates or subsidiaries other than wholly owned subsidiaries.

Respondent National Mediation Board ("Board" or "NMB") is an independent agency in the executive branch of the United States Government charged, among other duties, with the duties of investigating representation disputes among employees of carriers subject to the RLA, and of mediating disputes over changes in agreements between such carriers and representatives of their employees.

Respondent International Association of Machinists & Aerospace Workers, AFL-CIO ("IAM") is the labor organization certified by the NMB, after a mail-ballot election, as the representative of the craft or class of TWA's passenger service employees for purposes of collective bargaining under the RLA.

Respondents Deborah K. Boller et al. are passenger service employees of TWA who were working temporarily as interim replacements for striking flight attendants on the last day of the balloting period for the election and whose names the NMB thereafter deleted from the eligibility list for the election, and who then brought a separate action, consolidated with TWA's action in both the District Court and the Court of Appeals, to set aside the NMB's certification of the IAM.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Trans World Airlines, Inc. ("TWA") respectfully prays that a writ of certiorari issue to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit entered on February 19, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, pp. 1a—11a)[1] is officially reported at 839 F.2d 809. The opinion and order of the District Court (App. B, 14a-29a) are officially reported at 654 F.Supp. 447. The determinations of the National Mediation Board (App. C, 30a-44a) are officially reported at 13 NMB Nos. 63, 64 and 72.

JURISDICTION

The judgment of the U.S. Court of Appeals for the District of Columbia (12a-13a) was entered on February 19, 1988. This petition is filed within 90 days from that date. The jurisdiction of this Court to review the judgment on petition for certiorari rests upon 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The relevant portions of the Railway Labor Act ("RLA"), as amended, 45 U.S.C. §§ 151 *et seq.*, are reprinted as Appendix D hereto (45a-47a).

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1 The pages of the Appendices to this petition are referred to as "____a."

STATEMENT OF THE CASE

A. Introduction: Opportunities for Board To Change Outcome of an Ongoing Mail-Ballot Representation Election Provided by Board's Voting Procedures

The decision below affirms summary judgment dismissing, without first permitting requested discovery, TWA's (and Boller's) complaint seeking to set aside a certification of representative issued by the NMB, after a three-union mail-ballot election, in accordance, purportedly, with § 2, Ninth of the RLA, 45 U.S.C. § 152, Ninth.

The certification would not have been issued but for the Board's deletion from the eligibility list for the election—after all ballots had been received and then impounded, instead of being officially counted as scheduled—of the names of "all employees working as 'contingent flight attendants' on April 28, 1986" (35a), the last day of the 35-day balloting period for the election. As the court below noted:

> "[h]ad the 302 questioned employees been eligible, the 2,250 votes cast would have amounted to only 48.88% [of eligible voters], and certification would not have been in order" (4a).

In deleting these names the Board purported to act under its election rule that "[e]mployees who are working *regularly* in another craft or class on the same carrier will be considered ineligible to participate . . ." (50a-51a) (emphasis added). The truth was, however, as the court below noted, that the employees in question were at the time working *temporarily* in the flight attendant craft or class, and the Board so conceded in court:

> "*[t]he [302] employees in question, including individual plaintiffs in this action, were concededly on temporary assignment as flight attendants. All were regularly employed as passenger service employees within the bargaining unit* relevant to the controversy out of which the disputed election arose. As passenger service employees, they enjoyed higher wages than flight attendants and accepted the vol-

> unteer assignments after TWA's announcement that they would retain their current job title, salary, benefits, status and seniority." (3a) (emphasis added).

The case actually grows out of, on the one hand, the opportunities which the Board's voting procedures in mail-ballot elections provide to the Board for day-to-day monitoring, and for actually changing the outcome, of an ongoing mail-ballot election, and, on the other hand, the Board's institutional hostility to the right of carrier employees under § 2, Fourth of the RLA to reject union representation.

In a Board-conducted mail-ballot election, an employee votes *for* union representation by returning a valid ballot directly to the Board's offices in Washington, pursuant to express instructions (58a) previously mailed to each employee along with an official ballot (59a-60a) and an official ballot return envelope. The official ballot has boxes for each applicant union and for a "write-in" union but has no "no union" box (59a-60a). The official ballot return envelope is stamped on the front with the address of the Board's offices in Washington, and on the back with the NMB Case number for the election, the individual employee's Key number for the election, and spaces for the employee to print and sign his name.

An employee "votes" *against* union representation in a mail-ballot election by *not* returning a ballot:

> "All he need do is not vote and this is considered a vote against representation under the Board's practice of requiring that a majority of the eligible voters in a craft or class actually vote for some representative before the election is valid."

Brotherhood of Ky. & S.C. v. Ass'n for Benefit of Non-Contract Employees, 380 U.S. 650, 669 n. 5 (1965) ("*Non-Contract*"). The ballot itself contains the following grudging "instruction" only, in this regard:

> "No employee is required to vote. If less than a majority of the employees cast valid ballots, no representative will be certified." (59a).

The upshot for purposes of this case is that the Board's procedures for mail-ballot elections permit it—at any time during or after the balloting period when it so desires prior to the official counting of the ballots, which is done in the presence of the carrier and participating unions (56a)—to make an exact and private count of the number of ballot envelopes returned. The Board can thereby make an exact and private determination of whether less than a majority of eligible employees have participated in the election, in which event, as indicated, "no representative will be certified," under the Board's rules governing elections. In this case, TWA claims, the Board made such a private determination that a majority of eligible employees had not participated in the election—*i.e.*, had not returned ballots—and then, under Teamsters "pressuring," deleted the names of some hundreds of likely "no" votes from the eligibility list in order to bring about a certification result.

Overall, the decision below turns on the court below's understanding that "[j]udicial review of NMB decisions is one of the narrowest known to the law" (4a-5a). More specifically, it turns (1) on the court's observation that "there is no *express* statutory duty of neutrality" (5a) (emphasis added) applicable to the NMB in its carrying out of its duty under Section 2, Ninth to investigate representation disputes, and (2) on the court's holding that TWA's (and Boller's) papers failed to disclose or demonstrate a "*gross* violation of the statute" (5a) (emphasis added).

B. Passenger Service Craft or Class Established by Board in 1977 To Encourage Unionization; 20 of 29 Passenger Service Elections Held to Date Lost by Unions

It is no coincidence that this case involves passenger service employees, a large and largely unorganized segment of airline employees. Historically, the Board did not recognize passenger service employees as a separate Railway Labor Act "craft or class" but as part of a far larger craft or class of "clerical, office, stores, fleet and passenger service employees." *National Airlines, Inc.*, NMB Case No. R-1706, 1 NMB 423 (1947). In 1965, this Court approved the R-1706 grouping as "one that is

well-recognized under prior determinations of the Board and [that] has proven satisfactory in actual experience." *Non-Contract*, 380 U.S. at 665. Starting in 1977, however, the Board decided to abandon the R-1706 grouping, and to divide it into sub-groups including a craft or class of passenger service employees, in order to foster union representation among R-1706 sub-groups. In its lead case establishing a passenger service craft or class, the Board explained that it was doing so in order to "further the basic objectives of the Railway Labor Act," which are " 'the avoidance of industrial strife, by conference between the authorized representatives of employer and employee.' " *United Airlines, Inc.*, 6 NMB 180, 183 (1977). By 1980, the Board was saying that "the so-called R-1706 grouping of employees is no longer appropriate under most circumstances." *Trans World Airlines*, 8 NMB 151, 152 (1980).

Notwithstanding this monumental assist to the unions seeking to organize previously unrepresented employees within the R-1706 grouping, unions seeking to represent passenger service employees have lost 20 of the 29 elections held to date among passenger service employees alone, and have lost all nine of the big (over 1,000 eligible employees) elections except one, the election among TWA's approximately 4,600 passenger service employees being disputed in this case (App. G, 196a). It is one thing, of course, for the Board to promote union representation in its craft or class determinations, but quite another for it to promote that objective in its determinations of who is eligible to vote in a given craft or class in a given election, or not.

C. Union Representation Rejected Twice by TWA's Passenger Service Employees; Third Election Directed by NMB with Count Date of April 28, 1986

In 1979 and 1981 the NMB conducted mail-ballot representation elections among TWA's passenger service employees (101a). Both times a majority of the employees, by failing to cast valid ballots in the election, rejected union representation. *Trans World Airlines, Inc.*, 6 NMB 764 (1979); and *Trans World Airlines, Inc.*, 8 NMB 650 (1981). The 1981 election was attended by three court cases in two of which TWA litigated, in

part successfully, against NMB administrative action. *Trans World Airlines, Inc. v. NMB*, 107 L.R.R.M. (BNA) 2571 (1981); *International Bro. of Teamsters v. NMB*, 712 F.2d 1495 (D.C. Cir. 1983).

Subsequent to the 1979 and 1981 elections the Board changed its procedures for mail-ballot elections to provide for ballot return envelopes to be addressed, and ballots therefore to be sent, directly to the Board's offices in Washington, for holding by the Board itself until the count date, rather than to a post office box in Washington, for holding by the Postal Service until the count date. The reason for this "major change" was to avoid U.S. Postal Service charges of approximately $9,000 per year. Announcement, 8 NMB 682 (1981); 47 NMB Ann. Rep. 21 (1981).

In January 1986, three unions, respondent IAM, International Brotherhood of Teamsters ("Teamsters" or "IBT") and Independent Federation of Flight Attendants ("IFFA"), filed applications with the NMB to investigate a representation dispute among the craft or class of TWA's passenger service employees pursuant to § 2, Ninth of the RLA, thereby commencing NMB Case No. R-5610 (102a).[2]

On February 6, 1986, TWA furnished to the NMB, as required by the Board's rules (50a), a list of potential eligible voters as of the "Cut-Off Date" (January 9, 1986 for full-time employees, December 31, 1985 for part-time employees). The list had approximately 5,010 names, including the names of all of the employees whose later deletion from the list, after the close of the balloting period, gave rise to this case (147a).

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2 On January 20, 1986, the Board's representative assigned to process the case, Joseph E. Anderson, arrived at the property of TWA in Kansas City, Missouri to commence the NMB's investigation of the dispute, and met with TWA representatives, pursuant to the NMB's rules governing elections in representation cases (NMB Manual, Section 3.503). At that meeting, "Mr. Anderson thrust at us [TWA] a page from the list of potential eligible voters furnished by TWA to the Board in the 1981 passenger service case, and told us: 'produce a list and make it look like this; you're not going to jerk us around like you did in 1981; if you fail to cooperate, there are criminal penalties and it may have to go as high as President Reagan' " (145a).

NMB rules require a Board representative to conduct an investigation "with extreme impartiality, thoroughness and accuracy" (50a).

On February 12, 1986, the NMB directed an all mail-ballot election with IAM, IBT and IFFA to be placed on the ballot. The NMB later directed that the ballots would be mailed to eligible passenger service employees on March 24, 1986 and, to be counted, would have to be returned to the Board's offices in Washington, D.C. no later than April 28, 1986 at 2:00 p.m., E.D.S.T., at which time and place the ballots would then be counted (102a).

D. Strike by Flight Attendant Union; Passenger Service Employees Temporarily Working as Interim Flight Attendants Ruled Eligible by NMB Representative; Ruling Appealed by Teamsters

On March 7, 1986, IFFA, as representative of TWA's flight attendants, commenced a strike against TWA for a new flight attendant contract (102a). On the same date, TWA proceeded to implement its contingency plan for operating the airline, notwithstanding the IFFA strike, with (1) "crossover" flight attendants, *i.e.*, bargaining-unit flight attendants who elected to cross over IFFA picket lines and perform their regular flight attendant jobs, (2) "contingent flight attendants" ("CFA's"), *i.e.*, non-union-represented TWA employees who had volunteered to serve temporarily as flight attendants pending TWA's recruitment, hiring and training of permanent-replacement flight attendants, and (3) new-hire permanent-replacement flight attendants (103a). TWA was to assign approximately 1,200 of its non-union employees as "contingent flight attendants," of whom 339 were passenger service employees on the list of potentially eligible voters furnished by TWA to the NMB on February 6, 1986 (103a-104a, 184a).

On March 24, 1986, IBT wrote the NMB that it had questions as to the eligibility of the passenger service employees being used as replacements for striking flight attendants "particularly where permanent replacement status has been offered" (158a). On April 2, 1986, the NMB ordered TWA to furnish "a list of all employees presently on the eligibility list and working in another craft," adding:

> "TWA's attention is directed to *Section 5.303* of the NMB Representation Manual which states: 'Employees who are working *regularly* in another craft or class on the same carrier will be considered ineligible to participate in the craft or class involved in the Board representative's investigation' " (emphasis added) (161a).

On April 8, 1986, TWA notified the NMB that it recognized no obligation to furnish a list of the employees *temporarily* working outside the craft or class as flight attendants "as they are not ineligible under Section 5.303" (163a-164a). On April 23, 1986, TWA announced internally that it anticipated being able to commence returning passenger service employees still working as temporary flight attendants, to their regular jobs, "around May 10," as sufficient numbers of cross-overs and permanent replacements had been obtained to operate the airline's entire schedule (180a).

On April 25, 1986, and again on April 28, 1986, representatives of the IBT, IAM, IFFA and TWA met with NMB Representative Anderson at the NMB's offices in Washington. At the meeting on April 25, IBT representatives challenged the continued eligibility of the passenger service employees *temporarily* replacing striking flight attendants (142a, 155a). Opposing this challenge, TWA advised Anderson and another NMB representative, Roland Watkins, that TWA had available for inspection by the NMB the personnel files of all of the passenger service employees working temporarily as flight attendants, as well as other records establishing that such individuals were regularly employed passenger service agents only working temporarily in the flight attendant craft or class (154a). On that date, and again at a continuation of the meeting on April 28, 1986, Anderson ruled that passenger service employees formerly employed in the passenger service craft or class—*i.e.*, those approximately 26 persons who had applied and been accepted for permanent transfer to regular flight attendant positions—were ineligible to vote, but that those still serving as contingent flight attendants, and expected to return to their regular passenger service jobs as soon as they were replaced by new-hire permanent-replacement flight attendants or returning strikers,

were eligible (154a). On both dates he advised TWA that, given his ruling, NMB receipt of the personnel documentation was unnecessary (154a). At the meeting on April 28, 1986, TWA gave Anderson a copy of a bulletin announcing internally that "FLIGHT ATTENDANT RECRUITMENT HAS REACHED ITS OBJECTIVE; CONTINGENTS TO RETURN TO REGULAR JOBS BY END OF WEEK" (155a, 181a).

At 8:30 A.M. on April 28, 1986, IBT filed with the NMB an appeal from the Mediator's ruling that "individuals included on the list of potential eligible voters who are now [since on or after March 7, 1986] working as strike replacements for TWA flight attendants are eligible voters in this representation election" (61a). IBT's appeal consisted of a letter of counsel, unaccompanied by any affidavits, statements, or other evidence supporting its challenge to the eligibility of the CFA's. Specifying that it was not appealing from the Mediator's companion ruling that "employees *permanently* assigned as flight attendants are ineligible" (61a,n.1) and asserting that "IBT has reason to believe the number [of non-permanently assigned employees] may be as high as 500," IBT's appeal requested the NMB (I) to remove the "up to 500 passenger service employees [who] may be working as flight attendants" from the eligibility list "regardless of their alleged 'temporary' assignment" or (II), alternatively, to extend the voting period for two weeks (*i.e.*, through May 11, 1986) (64a).

E. Returned Ballots Held and Impounded in Manner Permitting Board and Parties To Ascertain That Disposition of Appeal Would Determine Outcome of Election; Appeal Opposed by TWA on Ground of Ending of Temporary Assignments; TWA Notified That Board Knows "What Ballots We Have" And That Teamsters "Pressuring the Board"

At 2:00 P.M. on April 28, 1986, the NMB, instead of officially counting and tallying the ballots as originally scheduled, impounded the ballots, which it had been receiving and holding over the 35-day balloting period, pending its determination of IBT's appeal. The impounding took place in the presence of representatives of TWA and each of the three unions. The bal-

lots were in individual official ballot return envelopes which were visible during the entire impounding procedure. Approximately 2,300 ballots appeared to have been cast (143a). Later that same day, the Mediator advised the parties that he had struck as ineligible (on grounds other than those involved here) 381 employees from the original list of 5,010, thus establishing the new total of eligible voters (pending appeal) at 4,629. If the Teamsters appeal were to fail, therefore, it appeared that the number of eligible employees who had returned ballots (approximately 2,300) would be less than a majority of all eligible voters (4,629), requiring dismissal of the representative election under the Board's rule requiring dismissal in cases where a majority of eligible employees failed to cast valid ballots. If the Teamsters appeal were to succeed, on the other hand, the number 2,300 would convert to a majority of all eligible voters (4,629 less, it turned out, 302 equals 4,327), avoiding dismissal under the Board rule and resulting in certification of a representative. (142a-143a).

On April 28, 1986, while the impounding took place, there was a colloquy between Anderson, the IBT's attorney, and a TWA attorney in which Anderson stated that "we know what ballots we have" (155a). Of course the Board would know "what ballots we have": the only way for an employee to vote had been to mail his ballot directly to the Board for holding until the count date, a procedure permitting the Board to make a private count of the number of ballot envelopes returned, at any time.

On April 30, 1986, the NMB's Executive Director telexed TWA "ordering TWA to furnish it with "the names of all the employees on the eligibility list who were *temporarily* working outside the craft or class of passenger service employees on April 28, 1986" (182a-183a).

On May 2, 1986, TWA filed with the Board a memorandum in opposition to IBT's appeal and to the NMB's Executive Director's "order" (69a). The memorandum annexed as exhibits various items of evidence (all of them missing from the Board's investigative file as later furnished by the Board to the District Court in this case) including an affidavit of William S. Borden,

TWA's Vice President of In-Flight Services, sworn to May 2, 1986, reporting that "[f]ewer than half of the [339] passenger service employees serving as [CFA's] remain in that capacity" (185a).

On or about April 30 and May 2, 1986, NMB Representative Anderson, in telephone conversations, repeatedly informed TWA that the Teamsters were very upset with his decision holding these employees eligible and that the Teamsters were "pressuring the Board" on this issue (155a-156a). The "pressuring" was, surely, in furtherance of IBT's then belief, as later admitted in its answer in this lawsuit, "that reducing the number of employees on the eligibility list might increase the chances for a certification" (IBT Answer, ¶ 41).

F. Names of Disputed Employees Deleted from Eligibility List by Board; Outcome of Election Determined by Deletion; Boller and TWA Actions Commenced; Concessions by NMB that Disputed Employees Were Working Temporarily in Flight Attendant Craft or Class

On May 13, 1986, the NMB issued a decision (i) finding all CFAs ineligible, on the basis of two NMB precedents involving the eligibility of employees working *regularly* in another craft or class at the time of the election (35a), (ii) ordering the ballots to be counted at 11:00 A.M. on May 16, 1986 (37a), and (iii) ordering TWA to furnish it "with the names of all employees on the eligibility list who were working as [CFA's], or otherwise assigned to the position of [CFA's] on April 28, 1986" by 1:00 P.M. on May 15, 1986 (37a). On May 14, 1986, TWA filed with the Board a motion to (1) reconsider and reverse its ineligibility determination of May 13, 1986; (2) "In the alternative, agree to reconsider this eligibility question if, after the vote count, the eligibility of [CFAs] could be determinative of the election outcome"; (3) use the actual count date of May 16, 1986 to determine eligibility, not the former count date of April 28, 1986; and (4) preserve the CFAs' ballots (88a-89a). On May 15, 1986, prior to 1:00 p.m., the Board denied TWA's motion in full (39a). TWA then, on May 15, 1986 at 1:00 p.m., furnished the NMB with the names of the passenger service employees, 302 in

number, temporarily working as flight attendants on April 28, 1986 (111a), more than half of whom had been released to their regular passenger service jobs as of May 2, 1986 (185a).

On May 16, 1986, by which date all 302 CFAs had returned to their regular passenger service jobs (112a), the NMB counted and tabulated the ballots. The results were that, of 4,330 eligible voters, 2,250 (51.96%) had cast valid ballots, and of those 2,250, 1,279 (56.84%) had voted for the IAM (43a). Thus, 29.5% of the eligible voters (1,279 of 4,330) had determined the outcome of the election.

On May 23, 1986, the NMB issued a certification of the IAM as the representative of TWA's passenger service employees (42a).[3] On May 29, 1986, the IAM demanded that TWA commence negotiations (113a). On June 10, 1986, the *Boller* and *TWA* lawsuits to set aside the certification were filed.[4] The following day TWA wrote IAM declining to bargain pending judicial review of the certification.

On July 8, 1986, the IAM commenced an action against TWA, later consolidated with the *TWA* and *Boller* actions, to compel TWA to bargain with it pursuant to the certification, and to enjoin TWA to restore pre-certification status quo, and not to make any further changes in wages, rules and working conditions pending exhaustion of the procedures set forth in § 6 of the RLA. On the same day, the IAM applied for a TRO, which was denied.

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3 On May 22, 1986, the NMB had notified TWA that it would preserve the ballots of the passenger service employees on the original voter eligibility list who had been working temporarily as flight attendants on April 28, 1986, "for at least one year from the date the representation case was closed by certification or dismissal" (113a).

4 The basis for federal jurisdiction in the *TWA* suit is 28 U.S.C. §§ 1331, 1337 and 1346(a)(2) and 45 U.S.C. § 151-188 (Railway Labor Act).

Both the *TWA* and *Boller* actions were brought in the United States District Court for the Southern District of Texas, where the *Boller* plaintiffs reside and work as passenger service agents for TWA. The actions were consolidated and then, on motion of the NMB, transferred to the United States District Court for the District of Columbus, on August 29, 1986.

In both the District Court and the court below the NMB filed briefs conceding that the 302 employees whose names it had deleted from the eligibility list for the election were working temporarily in the flight attendant craft or class, as reflected by the court below's references to them as "the employees in question, including individual plaintiffs in this action, [who] were *concededly on temporary assignment* as flight attendants" (3a) and as "the *concededly temporary* flight service attendants who desired to vote in the craft or class of their regular employment" (4a) (emphasis added). The NMB's concessions corresponded its position as to whether the CFA's were working regularly or temporarily in the flight attendant craft or class, not only to the position of TWA all along, but to the position of the IAM all along, both in its opposition to the Teamsters appeal in the NMB proceeding (83a) and in its answer to TWA's complaint in this law suit (IAM Answer, ¶ 1).

G. District Court Proceedings and Decision: Discovery Denied; Certification Held Non-Reviewable; TWA Ordered To Bargain, and Not To Make Further Changes Pending Exhaustion of RLA § 6 Procedures

The complaint in *TWA v. NMB* alleges, upon information and belief, that the NMB deleted the 302 names, after the close of the balloting period, (A) *in order to* change the outcome of the representation election from one which was apparently going to yield a no-union result, to one which would result in certification of one of the three participating unions (120a) and (B) without investigating whether or not the 302 employees were working not "regularly" but only "temporarily" within the flight attendant craft or class within the meaning of the NMB's own election rules (NMB Manual, Sections 5.302 and 5.303; 50a-51a, 119a). The complaint prays that the NMB's certification be set aside, and that the NMB be ordered to properly complete its investigation of the representation dispute by retabulating the ballots cast in the election, including as eligible voters all 302 passenger service employees working temporarily as flight attendants on April 28, 1986 (121a).

On July 14, 1986, 32 days after filing its complaint, TWA served interrogatories on NMB and IBT seeking to discover evidence in support of the information and belief allegations of its complaint (124a, 129a-132a; Int. Nos. 4, 6, 11, 13-15). On October 24, 1986, TWA moved to compel NMB and IBT to respond to the discovery requests which it had served July 14, 1986, on the ground that their 30 days to respond under Rules 33 and 34, Fed. R.Civ.P., had expired and they had obtained no extension or stay of the time to respond. On October 29, 1986, the *Boller* plaintiffs served a notice to depose the NMB representative assigned to investigate the case, Joseph E. Anderson, on November 12, 1986.

Thereafter, on November 4, 1986, the NMB moved for a protective order, and in addition moved to dismiss TWA and Boller's complaints pursuant to Rules 12(b)(1) and (6), Fed. R.Civ.P., or, in the alternative, for summary judgment.[5] On November 5, 1986, the IBT joined in NMB's motion for a protective order, and the IAM moved for summary judgment in its favor.

On November 18, 1986, Judge Oberdorfer denied TWA's motion to compel discovery without prejudice pending the resolution of the defendants' motion to dismiss, and granted NMB and IBT's motions for a protective order (20a at n. 4).

On February 18, 1987, Judge Oberdorfer granted NMB and IAM's respective motions for summary judgment and dismissed TWA's complaint (and the complaint in *Boller*), and enjoined TWA (1) to treat with IAM pursuant to Section 2, Ninth of the RLA, 45 U.S.C. § 152, Ninth, and (2) not to make any further unilateral changes in passenger service wages, rules and working conditions prior to exhaustion of the dispute resolu-

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5 Submitted in support of the motion to dismiss was an affidavit of Charles R. Barnes, Executive Director of the NMB, sworn to November 4, 1986, annexed to which were 51 documents represented by the NMB to "constitute the NMB's file of its investigation of this representation dispute" (NMB Memorandum in Support of NMB's Motion to Dismiss or, in the alternative, for Summary Judgment, at 4, n.1). Missing from the file, however, were a number of documents including *all* of the record evidence submitted to the NMB establishing the temporariness of the assignments of the passenger service employees involved in this case to flight attendant work.

tion procedures of Section 6 of the RLA, 45 U.S.C. § 156 (28a-29a).

H. Order To Bargain Not Appealed; Court of Appeals Decision: Non-Reviewability of Certification Affirmed; Order Not To Make Further Changes Reversed

TWA did not appeal the District Court's order to bargain with the IAM (6a at n. 3), and has been bargaining to date. It appealed the other parts of the District Court's decision adverse to it.

The Court of Appeals reversed the order not to make further changes pending exhaustion of the procedures of RLA § 6 (11a).[6] While noting that "[c]ertainly, [plaintiffs TWA and Boller's] argument is an appealing one" (4a), it affirmed the non-reviewability of the certification. Taking up TWA's contention that the NMB violated statutory "neutrality," the court simply observed:

> "However, there is no express statutory duty of neutrality, even if plaintiffs' complaints were taken to adequately allege a violation of such duty.[1]
>
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>
> "[1] The use of the word 'neutral' in the statute occurs in fact at 45 U.S.C. § 152, Ninth, 'in the conduct of any election for the purposes herein indicated, the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three *neutral* persons who after hearing shall within 10 days designate the employees who may participate in the election.' (Emphasis supplied). The word neutral does not occur as an adjective modifying the Board itself."

(5a). As to TWA's contention that the NMB's treatment of the CFA's reflected a failure to "investigate" within the meaning of RLA § 2, Ninth, the court did not take up the contention as such. It merely concluded that TWA's papers did not disclose or demonstrate a "gross violation of the statute" (5a), albeit "the treatment of these employees certainly does not cast the NMB in a very favorable light" (6a). "Therefore," the court

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6 On May 10, 1988, the Chief Justice signed an order extending to June 18, 1988, the IAM's time to petition for certiorari to review the D.C. Circuit's reversal.

ended, "under the principles set forth in [*Switchmen's*], the certification of the IAM as bargaining representative is not reviewable" (6a).

REASONS FOR GRANTING THE WRIT

The court below has decided an important question of federal law—whether the federal courts will protect the right of a craft or class majority under § 2, Fourth of the Railway Labor Act to reject union representation, as against deprivation of that right by improper actions of the National Mediation Board itself—which has not been, but should be, settled by this Court. The court below has decided this question in a way in conflict with the principles reflected in this Court's two previous decisions treating the judicial reviewability of NMB determinations in representation cases under § 2, Ninth of the Railway Labor Act, *Switchmen's Union of North America v. NMB*, 320 U.S. 297 (1943) ("*Switchmen's*") (NMB's "craft or class" determinations not reviewable), and *Bro. of Ry. & S.C. v. Ass'n for Benefit of Non-Contract Employees*, 380 U.S. 650 (1965) ("*Non-Contract*") (sufficiency of NMB's "investigations," and propriety of NMB's "rules governing elections," reviewable), and in conflict with the decision of the Fifth Circuit in *Russell v. NMB*, 714 F.2d 1332 (5th Cir. 1983), reh. den. 721 F.2d 819 (5th Cir. 1983), cert. den. 467 U.S. 1204 (1984) ("*Russell*") (NMB's actions depriving craft or class majority of right to reject union representation, reviewable). Ironically, the court below invoked, as supporting its decision, "the principles set forth in *Switchmen's*" (6a).

This Court has described the § 2, Fourth majority right as "that great right." *General Committee v. Missouri-Kansas-Texas Co.*, 320 U.S. 327, 333 (1943). The right is at stake in two recognizable types of cases which come before the Board: (1) cases, like the one at bar, arising from applications filed with the Board by unions or persons seeking to represent a previously unrepresented craft or class of carrier employees for purposes of collective bargaining under the Railway Labor Act—for this type of case the Board has promulgated, pursuant to Section 2, Ninth, fourth sentence, a nearly 100-page manual

of "the rules to govern the election"; and (2) cases arising from applications to decertify a currently certified or recognized union as the representative of a presently represented craft or class, for which type of case the Board refuses to establish such rules, *Chamber of Commerce of the United States*, 14 NMB 347, 358 (1987), thus relegating represented employees desiring to terminate union representation to "back-door" decertification procedures. Murphy, "Deunionization in the Airline and Railroad Industries: The Need for Legislative Reform," 35 Fed. Bar News & Journal 142, 146 (Mar./Apr. 1988).

Clarifying that "the principles of *Switchmen's*" permit judicial review of Board actions vitiating the right of a craft or class majority under § 2, Fourth to reject union representation will protect that right against what is usually the only source of danger to the right, improper actions by the Board itself, which the Board would hide behind the skirts of *Switchmen's*.

In addition, permitting judicial review in such cases will remove the anomaly of an administrative agency entrusted with protection of a statutory right itself functioning free of our society's normal check on administrative action—*i.e.*, judicial review, by which the federal courts keep federal agencies honest and faithful to their governing statute, unless Congress forbids such review. Surely it cannot be, as the facts of this case indeed illustrate, that the NMB is less in need of that restraint than any other governmental agency.

Permitting judicial review to protect majority rights to reject union representation, finally, will not necessarily be at the cost of majority rights to select union representation, given the power of the federal courts in appropriate cases to compel bargaining pursuant to a certification, pending, and subject to, judicial determination of a challenge to that certification. Indeed, in this very case, TWA has been bargaining with the IAM pursuant to the District Court's injunction, at the same time as it has been attempting to litigate the statutory validity of the Board's certification of the IAM. It may be argued that clear acceptance by the federal courts of a responsibility to protect § 2, Fourth majority rights from deprivations by the Board will increase the number of attempts by carriers, unions and others who lose elections to overturn the Board-certified results of the

election. That may be so, at least in the short run, though the size of the increase is impossible to predict. The net impact, though, will be increased protection of § 2, Fourth majority rights, no less the majority right to select union representation as to reject it. It hardly lies in the Board's mouth to complain about that.

I

Whether the Federal Courts Have Jurisdiction To Protect the Right of a Craft or Class Majority under § 2, Fourth of the Railway Labor Act To Reject Union Representation, as against Deprivation of That Right by the NMB Itself, Is an Important Question Which Should Be Settled by This Court

§ 2, Fourth of the Railway Labor Act guarantees to a majority of any craft or class of employees the right to select a collective bargaining representative:

> "The Act in § 2, Fourth writes into law the 'right' of the 'majority of any craft or class of employees' to 'determine who shall be the representative of the craft or class for the purposes of this Act.' That 'right' is protected by § 2, Ninth which gives the Mediation Board the power to resolve controversies concerning it and as an incident thereto to determine what is the appropriate craft or class in which the election should be held."

Switchmen's, 320 U.S. at 300-01. The § 2, Fourth right of a majority to select union representation includes the right to reject representation:

> "The legislative history supports the view that the employees are to have the option of rejecting collective representation."

Non-Contract, 380 U.S. at 669 n. 5.

It has been held since the earliest days of the Railway Labor Act that the federal courts have jurisdiction to protect § 2, Fourth majority rights against *carrier* interference. In *Texas & N.O.R. Co. v. Bro. of R. & S.S. Clerks*, 281 U.S. 548 (1930), a pre-§ 2, Fourth case, this Court affirmed an injunction against a carrier under the no-interference provisions of § 2, Third,

specifically holding those provisions to be judicially enforceable. (281 U.S. at 569-70). In *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515 (1937), which arose after the enactment in 1934 of §§ 2, Fourth and Ninth, this Court held that the obligation of a carrier under § 2, Ninth of the RLA to "treat with" a union certified by the Board was "mandatory in form and capable of enforcement by judicial process" (300 U.S. at 545), noting as to the no-interference provisions of §§ 2, Third and Fourth:

> "the prohibition against such interference was continued and made more explicit by the amendment of 1934. Petitioner does not challenge that part of the decree which enjoins any interference by it with the free choice of representatives by its employees, and the fostering, in the circumstances of this case, of the company union. That contention is not open to it in view of our decision in the Railway Clerks Case, supra, and of the unambiguous language of section 2, Third, and Fourth, of the act, as amended (45 U.S.C.A. § 152, subds. 3, 4)."

(300 U.S. at 543-4).[7]

It would therefore seem axiomatic that the federal courts also have jurisdiction to protect § 2, Fourth majority rights against deprivation by the Board itself. Certainly, under the three tests of judicial enforceability of RLA obligations stated in *Chicago & North Western Ry. Co. v. UTU*, 402 U.S. 570, 578 (1971):

> "[1] the importance of the duty in the scheme of the Act, [2] the capacity of the courts to enforce it effectively, and [3] the necessity for judicial enforcement if the right of the aggrieved party is not to prove illusory."

judicial enforcement of the Board's duty to protect § 2, Fourth majority rights would be proper. See, also, *General Committee v. Missouri-Kansas-Texas R. Co.*, 320 U.S. 323, 331 (1943),

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7 In *Air Line Pilots Ass'n v. Transamerica Airlines, Inc.*, 817 F.2d 510 (9th Cir. 1987); *Ruby v. Taca Int'l Airlines, S.A.*, 439 F.2d 1359 (5th Cir. 1971); and *Adams v. Federal Express Corp.*, 654 F.2d 452 (6th Cir. 1981), aff'g 470 F.Supp. 1356 (W.D. Tenn. 1979), § 2, Fourth injunctions against carriers were approved.

where this Court listed the § 2, Fourth right of a craft or class majority as among the commands of the RLA which "could not have been intended to be without legal sanction" (320 U.S. at 150), without any indication that the right was to be without legal sanction as against the Board itself. The Board, after all, can do more damage to those rights, by mere clerical slips,[8] let alone by erroneous or corrupt eligibility determinations, than any carrier or union ever dreamed of.

Yet, the court below held—even in this case where it appears that the Board itself, by a post-election eligibility redetermination based on an inapplicable ground conceded away in court, changed the outcome of the election from a likely no-union result to a union result—that "under the principles set forth in [*Switchmen's*], the certification of the IAM as bargaining representative is not reviewable" (6a). Such a holding, leaving § 2, Fourth majority rights to reject union representation unprotected from the source of the greatest danger to those rights, cries out for correction by this Court.

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8 See *International Bro. of Teamsters v. NMB*, 107 LRRM (B.N.A.) 3038 (D.D.C. 1981), an action by the Teamsters union to enjoin the NMB from conducting a second election, where in the first election, among 120 eligible employees, the Board had stamped 57 of the ballot return envelopes with the incorrect Board case number, and only discovered those 57 envelopes "during a routine visit to the post office" (107 LRRM at 3038) some four months after dismissing the original representation application, without certifying a representative, based on failure of a majority of eligible employees to cast valid ballots. Upon discovering the clerical mistake, the Board took steps to correct it, pursuant to the request of the Teamsters, which resulted in issuance of a certification after all. (By contrast, in the case at bar the Board has come close in the courts below to confessing that its treatment of the CFA's as working regularly outside the craft or class was a mistake, but has resisted all efforts by the carrier and employees opposing unionization to require it to correct the mistake.) Of course, if in *IBT v. NMB* the Board had not itself undertaken to correct its mistake, and if instead the IBT had sued to correct the mistake, the Board would presumably have asserted that *Switchmen's* barred judicial review!

II

The Decision Below Conflicts with the Principles Reflected in this Court's Decisions in *Switchmen's* and *Non-Contract* and with the Fifth Circuit's Decision in *Russell*

A. The Principles Set Forth in *Switchmen's* and *Non-Contract*

Switchmen's was an action by a union which had previously represented a number of a carrier's yardmen to set aside a certification issued by the NMB to another union, after an election, covering all of the carrier's yardmen. It presented, in short, the problem of a jurisdictional dispute between two unions. This Court first carefully noted that:

> "*If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control.* That was the purport of the decisions of this Court in Texas & N. O. R. Co. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548, 50 S.Ct. 427, 74 L. Ed. 1034, and Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515, 57 S. Ct. 592, 81 L.Ed. 789. In those cases it was apparent that but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act. The result would have been that the 'right' of collective bargaining was unsupported by any legal sanction. That would have robbed the Act of its vitality and thwarted its purpose."

and that:

> "Generalizations as to when judicial review of administrative action may or may not be obtained are of course hazardous. *Where Congress has not expressly authorized judicial review, the type of problem involved and the history of the statute in question become highly relevant in determining whether judicial review may be nonetheless supplied.*"

(302 U.S. at 301) (emphasis added). The Court then held that there was no jurisdiction to review an NMB craft or class determination "in face of the special circumstances which obtain here" (320 U.S. at 300). The "special circumstances" cited were that the legislative history of § 2, Ninth showed that Congress had not desired to implicate the federal judiciary in the "explosive problem," at which § 2, Ninth "was aimed," of "jurisdictional disputes between unions" (320 U.S. at 302-3).

In a companion case to *Switchmen's* the Court reserved decision as to judicial review in other "types of situations":

> 12. Whether judicial power may ever be exerted to require the Mediation Board to exercise the "duty" imposed upon it under § 2, Ninth, and, if so, the type or types of situations in which it may be invoked present questions not involved here.

General Committee v. Missouri-Kansas-Texas R. Co., 320 U.S. 323, 336 n. 12 (1943).[9]

The principles set forth in *Switchmen's* were expressly followed and applied in *Leedom v. Kyne*, 358 U.S. 184, 189-91 (1958), a case arising the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 141-187. *Leedom v. Kyne* was an action by a union of professional employees, bypassing the express NLRA provisions for judicial review, 29 U.S.C. § 160(e) and (f), to set aside a determination and certification issued by the National Labor Relations Board ("NLRB"), including 233 professional employees in a bargaining unit with nine nonprofessional employees, without taking a vote among the professional employees, under 29 U.S.C. § 159(b)(1), to ascertain whether a majority of them desired inclusion in a unit with nonprofessional employees. No judicial review was available to the plaintiff union under the review provisions of the NLRA. The

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9 In a case decided later the same year, 1943, the Court applied *Switchmen's* to sustain an NMB craft or class determination denying separate representation to a carrier's "Red-Caps" on the ground that they belonged in a larger craft or class, notwithstanding that they were not eligible for membership in the union already representing the larger craft or class, because they all were "colored," *Bro. of Ry. & S. C. v. United Transport Service Employees*, 320 U.S. 715 (1943) (per curiam), reversing 137 F.2d 817, 819 (D.C. Cir. 1943).

question set was whether the review provisions of the NLRA destroyed jurisdiction under 28 U.S.C. § 1337 (358 U.S. at 187). This Court held that, in the absence of jurisdiction of the federal courts, the right of the majority of professional employees created by Congress would be obliterated, and therefore there was jurisdiction under 28 U.S.C. § 1337.[10]

Non-Contract, decided in 1965, 22 years after *Switchmen's*, was an action by a carrier to require the Board to hold a hearing as to appropriate craft or class, and to require the Board to use a ballot with a "no-union" box in any election. This Court, easily distinguishing *Switchmen's* as a case which "involved a question of statutory construction, *i.e.*, whether the Act permitted the division of crafts or classes of a single carrier into smaller units for collective bargaining purposes" (380 U.S. at 658-59), held judicially reviewable, and itself determined on the merits, the following *two* other "types of situations":

> 1. whether the Board, in determining, without a hearing, the appropriate craft or class for an election which the Board had directed, "performed its statutory duty to 'investigate' the dispute" (380 U.S. at 661) under § 2, Ninth, first sentence;
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> 2. whether the Board, in determining to use a form of ballot for the election without a "no union" box, "has acted in excess of its statutory authority" (380 U.S. at 669) under § 2, Ninth, fourth sentence, to "establish the rules to govern the election".

The Court expressed its decisions as holdings that (1) "[the Board's craft or class] determination, therefore, is not subject to judicial review" (380 U.S. at 668) and (2) "the Board's choice of its proposed ballot is not subject to judicial review" (380 U.S. at 671). The Court's opinion as a whole makes clear, however, that it in fact engaged in judicial review of both disputed Board determinations in the sense that it proceeded as if it had " 'authority to decide the case either way.' " *General*

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10 The theory of 28 U.S.C. § 1337 jurisdiction to enforce the RLA § 2, Fourth, right of the majority of TWA's passenger service employees to reject union representation is just that simple.

Committee v. Missouri-Kansas-Texas R. Co., 320 U.S. 323, 337 (1943).

Switchmen's and *Non-Contract*, thus, are entirely consistent both with each other, as well as with the general principles of judicial review as most recently stated by this Court in *Traynor v. Turnage*, ____ U.S. ____, 56 U.S.L.W. 4319, 4321 (Apr. 20, 1988). In *Switchmen's*, the strong presumption in favor of judicial review was overcome by specific legislative history giving finality to Board craft or class determinations; in *Non-Contract*, which (like the case at bar) involved a problem other than defining the appropriate craft or class, the presumption in favor of judicial review obtained. See Jaffe, The Right to Judicial Review I, 71 Harv. L. Rev. 401, 432 (1958):

> "But judicial review is the rule. It rests on the congressional grant of general jurisdiction to the article III courts. It is a basic right; it is a traditional power and the intention to exclude it must be made specifically manifest."

Yet the D.C. Circuit, which decides so many of the cases brought to set aside NMB actions in representation cases, persists in its pre-*Non-Contract* view[11] that "[j]udicial review of NMB decisions is one of the narrowest known to the law" (4a-5a). That was never so, reading *Switchmen's* with the care with which it was written, and it certainly hasn't been so since *Non-Contract*.

B. The Decision Below Conflicts with *Switchmen's*

The decision below conflicts with the principles of *Switchmen's*. First, *Switchmen's* specified that: "The function of the Board under § 2, Ninth is more the function of a referee" (320 U.S. at 304). The Board departed from that function in this

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11 See *Air Line Dispatchers Ass'n v. NMB*, 189 F.2d 685, 688 (D.C. Cir. 1950), cert. den. 342 U.S. 849 (1951) (Board's dismissal of an application to represent non-U.S. employees reviewable, because "[t]his in no sense is Board action within the framework of Section 2, Ninth"); and *Decker v. Linea Aeropostal Venezolana*, 258 F.2d 153 (D.C. Cir. 1958) (even accepting as true for purposes of appeal that Board's ruling four employees ineligible deprived them of their right to vote, and changed the outcome of the election to certification of a union, judicial review prohibited by *Switchmen's*).

case when, in response to the Teamsters' appeal and "pressuring", it reversed the ruling of its Representative in order to change the outcome of the election to a union result.

Second, as to judicial reviewability, the *Switchmen's* approach is first to inquire whether the case involves possible obliteration of a right created by Congress. The case at bar meets that test: the Board's post-election deletion of the names of the CFA's from the eligibility list, thereby converting the ballots cast, *i.e.*, the "yes" votes, from a minority to a majority, obliterated the right of the majority of a craft or class, which "§ 2, Fourth writes into law," *Switchmen's*, 320 U.S. at 300, to select the representative, which is also a right to reject collective representation, *Non-Contract*, 380 U.S. at 669 n.5.

Switchmen's also entails judicial examination, "[w]here Congress has not expressly authorized judicial review, [of] the type of problem involved and the history of the statute" (320 U.S. at 301). The "type of problem" involved in the case at bar, conduct by the Board depriving the majority of a craft or class of its § 2, Fourth right to reject union representation, does not implicate the "explosive problem" of jurisdictional disputes between unions at which § 2, Ninth "was aimed." It is surely judicially reviewable under the same rationale—to protect and vindicate "[t]he right to a fair and free election [which] is plain under the Act"—used by the Court of Appeals itself in an earlier case, citing *Switchmen's*, to explain its consideration of the merits of another claim of Board misconduct, namely, Board deviation from a duty to be impartial as between two unions competing in a representation election. *Brotherhood of Ry. & S.S. Clerks v. NMB*, 374 F.2d 269, 273 (D.C. Cir. 1966). As to "the history of the statute": there is legislative history suggesting recognition of the distinction between, on the one hand, questions of what shall be the craft or class for an election, and, on the other hand, questions of who shall be eligible or not to vote in the craft or class. *Railway Labor Act Amendments: Hearings on H.R. 7650 Before the Committee on Interstate and Foreign Commerce, House of Representatives, 73rd Cong., 2nd Sess.*, p. 40 (1934) (testimony of Commissioner Eastman). The former (craft or class) questions implicate jurisdictional disputes between unions, which Congress desired the Board to de-

cide with finality (and with neutrality), whereas the latter (eligibility) questions, which Congress also desired the Board to decide with neutrality, do not implicate jurisdictional disputes between unions but, rather, "that great right" of a craft or class majority to select or reject union representation.

Third, the decision below conflicts with *Switchmen's* to the extent that it imposes, beyond the standards for judicial review recognized in *Switchmen's*, a further requirement, never approved by this Court, making the right to judicial review depend on the presence of "a *gross* violation of the statute." The D.C. Circuit first formulated the "gross violation" standard—without defining it—in *Int'l Bro. of Teamsters v. BRAC*, 402 F.2d 196, 205 (D.C. Cir. 1968), cert. den. 393 U.S. 848 (1968), as a matter, apparently, of grafting a *Leedom v. Kyne*-type exception on to "the doctrine of *Switchmen's Union* that the courts have no jurisdiction to intervene in representation disputes committed by the Railway Labor Act to final Board action" (402 F.2d at 204). *Leedom v. Kyne*, 358 U.S. 184 (1958), is an exception, however, not to any general prohibition of judicial intervention in representation disputes committed by the NLRA to the NLRB—there is no such general prohibition; the NLRA expressly provides for judicial review of NLRB determinations in unfair labor practice cases, 29 U.S.C. § 160(e) and (f), and thereby for judicial review of NLRB determinations in representation cases, *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 154 (1941). Rather, *Leedom v. Kyne* is an exception to the exclusivity of the NLRA's provisions for judicial review, permitting review under 28 U.S.C. § 1337 in cases not reviewable under those provisions. Put another way, *Leedom v. Kyne* provides a second procedure—the NLRA's express provisions for judicial review are the first—for judicial review under the NLRA. That is a reason for restricting *Leedom v. Kyne* review to a narrow class of cases—say, cases of "gross violation"—under the NLRA. Under the RLA, however, which has no express provisions for judicial review in representation cases committed to the NMB, no such reason exists to so restrict review under 28 U.S.C. § 1337.

In any event, as used by the courts, the "gross violation of the statute" standard is not so much a standard for judicial re-

view as it is a rubric for denying judicial review. One must draw this conclusion from the fact that no plaintiff has ever been able to prove a "gross violation of the statute" in the entire 54 years, 1934 to date, of the Board's existence. Rather, in the only *two* reported cases where a court has set aside a Board representation decision, both of them "insufficient investigation" cases, the standard has been, not whether the Board committed a "gross violation of the statute," but whether, simply, it violated the statute. In *Int'l In-Flite Catering Co. v. NMB*, 555 F.2d 712 (9th Cir. 1977), the court affirmed the setting aside of a certification issued on the basis of "Request for Representation Election" cards (as distinguished from cards authorizing representation). In *Russell v. NMB*, 714 F.2d 1332 (5th Cir. 1983), reh. den. 721 F.2d 819 (5th Cir. 1983), cert. den. 467 U.S. 1204 (1984), the court set aside an NMB order dismissing, on the ground of the absence of any RLA provision for decertification, an application seeking a decertification election.

No independent reason appears why, to apply the facts of this case, a Board violation of the statute which obliterates the statutory right of a craft or class majority to reject union representation should be judicially reviewable where the violation is "gross," but should be given finality where it is not "gross."

C. The Decision Below Conflicts with *Non-Contract*.

The decision below also conflicts with *Non-Contract*, which permits inquiry into whether the Board performed its statutory duty to "investigate", and into whether it acted in excess of its statutory power to "establish the rules to govern the election." As to the former: the Board in this case specifically undertook to investigate whether the CFA's were "working regularly in another craft or class" (50a) and determined, apparently, that they were, deleting their names from the eligibility list accordingly. That this exercise fell far short of a sufficient statutory "investigation", however, became apparent in court, when (A) the Board conceded, as the court below noted, that the CFA's were working temporarily in the flight attendant craft or class (3a), and (B) the Board submitted to the District Court, in support of its motion for summary judgment, what it represented

as its "investigative file for this case" and that "investigative file" turned out to be missing all of TWA's affidavit and other evidence submitted in opposition to the Teamster's appeal then pending before the Board (*supra* at 14 n. 5), see *Morgan v. U.S.*, 298 U.S. 468, 480-1 (1936) ("If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given.").[12]

As to whether the Board acted in excess of its § 2, Ninth power to "establish the rules to govern the election": the Board's deletion of the CFA's from the eligibility list has the aspect, among others, of a new rule for elections making craft or class employees working temporarily in another craft or class as interim strike replacements ineligible to participate in an election in their regular craft or class. If that is how the Board's determination should be taken, then it has acted in excess of its statutory power to establish election rules by establishing a rule which penalizes a carrier being struck by a union representing one craft or class, at the time of an election in another craft or class, for exercising its right and duty under the RLA to operate during the strike utilizing temporary replacements from the other craft or class pending the hiring of permanent replacements for the strikers. See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 339 (1938); *Bro. of Ry. & S.C. v. Florida East Coast Ry. Co.*, 384 U.S. 238, 244 (1966); *Air Line Pilots Ass'n v. United Air Lines*, 802 F.2d 886, 895, 907-08 (7th Cir. 1986), cert. den. 107 S.Ct. 1605 (1987).

The decision below further conflicts with *Non-Contract* in that it applied a standard, "*gross* violation of the statute," at odds with the standard used in *Non-Contract*, which does not make judicial review of reviewable NMB determinations in rep-

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12 See *S.D. Warren Co. v. NLRB*, 342 F.2d 814 (1st Cir. 1965), cert. den. 383 U.S. 958 (1966), wherein the First Circuit granted the employer's petition to set aside a certification issued by the NLRB on the basis of a record apparently missing "two material exhibits" (342 F.2d at 815), to the extent of giving the three NLRB panel members two weeks to furnish "individual affidavits" (342 F.2d at 817) removing any doubt as to the matter; "[o]therwise, the only alternative will be to remand the proceedings for a reconsideration of the representation issue by the Board on the basis of the exhibits or replicas, as what they then must be, 'new matter' " (*ibid.*).

resentation cases depend upon "the adjective 'gross' ". *Brotherhood of Ry. & S.S. Clerks v. NMB*, 374 F.2d 269, 276 (D.C. Cir. 1966) (concurring opinion of then-Judge Burger).

D. The Decision Below Conflicts with *Russell.*

The decision below also conflicts with that of the Fifth Circuit in *Russell*. *Russell* was an action to compel the NMB to conduct a decertification election. This the Board had refused to do because, according to the Board, (1) the person seeking the election did not intend to "represent" the employees within the meaning of the RLA, and (2) allowing decertification would violate its duty to achieve the basic purpose of the Act, the avoidance of work stoppages, for which "collective representation is necessary" (714 F.2d at 1341). The Fifth Circuit dismissed the first argument as "nothing more than playing games with the plaintiffs and with this court" (714 F.2d at 1342). Turning to the second "more substantive" argument, the court quoted from §§ 2, Third and Fourth and then concluded, on the basis of the language and legislative history of those sections:

> ". . . The Board is therefore correct when it argues that the Act supports collective bargaining and when it argues that one of the Board's purposes is to support collective bargaining.
>
> "*This in no way, however, takes away from the fact that employees were given the right under the Act not only to opt for collective bargaining, but to reject it as well.*"

(714 F.2d at 1343) (emphasis added). The Fifth Circuit then remanded the case to the Board "and directed it to proceed with its investigation into the application filed by Russell as it would any other application for investigation of a representation dispute" (714 F.2d at 1347).

If the Fifth Circuit is right in its view that it had jurisdiction to set aside the Board's determination not to conduct a decertification election, as a matter of vindicating the right of employees under § 2, Fourth to reject collective representation, then the courts below were wrong in denying discovery otherwise

permissible under Rule 26, Fed. R. Civ. P., and in dismissing TWA's claim that the Board violated § 2, Fourth of the Railway Labor Act by deleting the names of the CFA's from the eligibility list, after receipt of all the ballots, in order to change the outcome of the election to a union result.[13]

CONCLUSION

TWA's petition for a writ of certiorari to review the decision of the U.S. Court of Appeals for the District of Columbia should be granted.

Dated: May 19, 1988

Respectfully submitted,

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Attorneys for Petitioner

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13 See *Morgan v. U.S.*, 298 U.S. 468 (1936), wherein this Court held that the District Court had erred in striking information and belief allegations of a complaint that the Secretary of Agriculture "at the time said Order was signed by him had not personally heard or read any of the evidence presented at any hearing in connection with this proceeding . . ." (298 U.S. at 474 n. 1), thus, as in this case, "deny[ing plaintiffs] opportunity to require an answer to these allegations or to prove the facts alleged" (298 U.S. at 476), and that the defendants "should be required to answer these allegations, and the question whether plaintiffs had a proper hearing should be determined" (298 U.S. at 482).

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 87-5092, 87-5093 and 87-5176

Argued Jan. 7, 1988
Decided Feb. 19, 1988

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO

v.

TRANS WORLD AIRLINES, INC., Appellant.

TRANS WORLD AIRLINES, INC., Appellant,
Deborah K. Boller, et al.

v.

NATIONAL MEDIATION BOARD, et al.

TRANS WORLD AIRLINES, INC., Appellant,
Deborah K. Boller, et al.

v.

NATIONAL MEDIATION BOARD, et al.

Appeals from the United States District Court for the District of Columbia (Civil Action Nos. 86-01912 and 86-02980).

Eric Rosenfeld, New York City, for appellant Trans World Airlines. Deborah A. Folloni and Ronald A. Lindsay, Washington, D.C., entered appearances for appellant Trans World Airlines.

Michael E. Avakian, North Springfield, Va., for appellants Deborah K. Boller, et al.

Mark W. Pennak, Atty., Dept. of Justice, with whom, Richard K. Willard, Asst. Atty. Gen., Joseph E. diGenova, U.S. Atty., Ronald M. Etters, General Counsel, Nat. Mediation Bd. and John F. Cordes, Atty., Dept. of Justice, Washington, D.C., were on the brief, for appellees Nat. Mediation Bd. William Kanter, Atty., Dept. of Justice, Washington, D.C., also entered an appearance for appellee Nat. Mediation Board.

John A. Edmond, with whom Joseph Guerrieri, Jr., Washington, D.C., was on the brief, for appellee Intern. Ass'n of Machinists and Aerospace Workers.

Before:

RUTH BADER GINSBURG, WILLIAMS, and SENTELLE,
Circuit Judges.

Opinion for the Court filed by Circuit Judge SENTELLE.

SENTELLE, *Circuit Judge*:

These three consolidated appeals concern union representation of passenger service employees of Trans World Airlines, Inc. (TWA). In the District Court, TWA and the individual plaintiffs sought to set aside the National Mediation Board (NMB) certification of the International Association of Machinists and Aerospace Workers (IAM) as bargaining representative. IAM sought an order requiring TWA to commence bargaining and enjoining TWA from altering wages, rules and working conditions, and to retroactively restore conditions to those that existed on May 23, 1986 (the date on which IAM was certified as the bargaining representative for the passenger ser-

vice employees). The District Court held that the certification of IAM as the bargaining representative was unreviewable pursuant to *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 64 S.Ct. 95, 88 L.Ed. 61 (1943). The District Court then ordered TWA to commence bargaining and enjoined *prospective*, unilateral changes in working conditions. TWA appeals both the certification and the injunction against prospective unilateral changes. As to the first of those questions, we find no error and affirm. As to the second, we reverse.

I.

The threshold question is whether this Court should reverse the District Court and vacate the NMB certification of IAM as the representative of TWA's passenger service employees. If we answer this issue in favor of TWA and against IAM, the injunction becomes void. TWA's attack on the certification is grounded on the NMB's decision to exclude from the representation election TWA passenger service employees serving as temporary flight attendants while regular flight attendants were on strike. The relevant facts are set out in detail in the District Court's opinion, *International Association of Machinists v. TWA, Inc.*, 654 F.Supp. 447 (D.D.C.1987), and we will repeat only those necessary to an understanding of this decision.

The employees in question, including individual plaintiffs in this action, were concededly on temporary assignment as flight attendants. All were regularly employed as passenger service employees within the bargaining unit relevant to the controversy out of which the disputed election arose. As passenger service employees, they enjoyed higher wages than flight attendants and accepted the volunteer assignments after TWA's announcement that they would retain their current job title, salary, benefits, status, and seniority. Nonetheless, since the employees were actually working in "another craft or class" on the date of the election, the NMB declared them ineligible, purportedly on the basis of its prior decision in *Trans World Airways, Inc.*, 8 N.M.B. 663 (1981). In that opinion, the employees in question, rather than being on temporary assignment, were actually on permanent assignments but sought eligibility to vote

in prior positions as to which they retained "recall" rights. The affected employees in the case before us, together with TWA, suggest that the prior NMB decision is plainly distinguishable since the employees in the prior case had a "present interest in their present craft or class" not paralleled by the concededly temporary flight service attendants who desired to vote in the craft or class of their regular employment. TWA and the individual plaintiffs contend that this resulted in unfairness and was not supported by the evidence before the Board.

The election was in fact a very close one. Certification would be granted only if a majority of eligible voters cast ballots in favor of representation. The decertification decision, with reference to the individual plaintiffs and others of their class, was made after all ballots had been received. 1,279 eligible voters cast ballots for IAM, 935 for International Brotherhood of Teamsters, and 36 for the IFFA. Thus, 2,250 valid ballots were cast in favor of representation. The total number of valid ballots was 4,308 so that 51.96% voted in favor of representation. Had the 302 questioned employees been eligible, the 2,250 votes cast would have amounted to only 48.88%, and certification would not have been in order. It was on this basis that TWA and the individual plaintiffs prayed the District Court to void the certification.

They argue that under the Board's own representation manual, revised edition effective on November 1, 1985, temporary employees of the sort represented by plaintiffs here should have been counted in their regular craft. Section 5.302 of that manual reads:

> Employees who are working *regularly* in another craft or class on the same carrier will be considered ineligible to participate in the craft or class involved in the Board representative's investigation. (Emphasis supplied).

Plaintiffs contend that under no reasonable construction of "regularly" can these employees be found ineligible. Certainly, their argument is an appealing one. Unfortunately for plaintiffs, both the District Court and this Court are without the power to grant the relief prayed. Judicial review of NMB deci-

sions is one of the narrowest known to the law. As the District Court noted, "It has been established for over twenty years that courts have no authority to review NMB certification decisions in the absence of the showing on the face of the pleadings that the certification decision was a gross violation of the Railway Labor Act or that it violated the constitutional rights of an employer, employee, or Union." 654 F.Supp. at 450. Citing *Brotherhood of Railway and S.S. Clerks v. Association for the Benefit of Noncontract Employees*, 380 U.S. 650, 658-660, 661-62, 85 S.Ct. 1192, 1196-97, 1198-99, 14 L.Ed.2d 133 (1965); *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297, 303, 64 S.Ct. 95, 98, 88 L.Ed. 61 (1943), *inter alia*.

In the instant case, plaintiffs contend that the pleadings reflect such a gross violation of the statute in that the Board's decision to decertify the decisive block of eligible voters on so tenuous a basis after the cut-off of eligibility date and the receipt of all ballots violates a statutory duty of neutrality. However, there is no express statutory duty of neutrality, even if plaintiffs' complaints were taken to adequately allege a violation of such duty.[1] And the "peek at the merits" permitted to this Court when reviewing NMB decisions, *IBT v. BRAC*, 402 F.2d 196, 205 (D.C.Cir.1968), *cert. denied sub nom. BRAC v. NMB*, 393 U.S. 848, 89 S.Ct. 135, 21 L.Ed.2d 119 (1968), does not disclose a "gross violation of the statute."

Similarly unavailing is plaintiffs' argument that the Board's disenfranchisement of the temporary flight attendants constitutes a violation of constitutional rights. The disenfranchised voters and TWA claim that the voters' "right of association" was violated by NMB's decertifying them, which they contend was for associating with TWA. They offered the District Court no authority for this proposition, nor have they offered any

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1 The use of the word "neutral" in the statute occurs in fact at 45 U.S.C. § 152 Ninth, "in the conduct of any election for the purposes herein indicated, the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three *neutral* persons who after hearing shall within 10 days designate the employees who may participate in the election." (Emphasis supplied). The word neutral does not occur as an adjective modifying the Board itself.

here, nor indeed have we independently found any such authority. While the treatment of these employees certainly does not cast the NMB in a very favorable light, that treatment does not reach the level of violating a constitutional right, and we are constrained to hold, for the reasons stated by the District Court, that plaintiffs have failed to demonstrate either a gross violation of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*,[2] or any violation of the Constitution. Therefore, under the principles set forth in *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 64 S.Ct. 95, 88 L.Ed. 61 (1943), the certification of the IAM as bargaining representative is not reviewable.

II.

TWA's challenge to the District Court injunction against unilateral change of working conditions is more troublesome. After certification, TWA refused to treat with the newly certified representative pending resolution of litigation over the validity of the certification and made unilateral changes in working conditions, specifically by giving flight attendants a role in passenger pre-boarding—"a change that, however desirable as an economy or an efficiency, would have been clearly bargainable if a collective bargaining agreement had been in place." 654 F.Supp. at 452. IAM prayed the District Court to order TWA to bargain in good faith, which the District Court did; to roll back the unilateral change in working conditions, which the District Court refused; and to enjoin TWA from making further unilateral changes in working conditions pending the entry of a collective bargaining agreement.[3] In considering the third section of IAM's prayer for injunctive relief, the District Court weighed relevant authorities to determine that

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2 The provisions of the Railway Labor Act, except 45 U.S.C. § 153, are applicable to airlines. 45 U.S.C. § 181.

3 The first two rulings in the District Court's injunctions are not under attack here and are in accordance with fixed principles of railway labor law. *See generally* 45 U.S.C. § 152 and authorities collected in *International Association of Machinists & Aerospace Workers v. Trans World Airlines, Inc.*, 654 F.Supp. 447 (D.D.C. 1987).

TWA's refusal "to negotiate with the IAM over the wages, rules, and working conditions of its passenger service employees despite . . . certification by the National Mediation Board," was a violation of "Section 2, First, Fourth, and Ninth of the Railway Labor Act, 45 U.S.C. § 152, First, Fourth, and Ninth." 654 F.Supp. at 456. The District Court then ordered that TWA "be enjoined from making any further unilateral changes in the wages, rules, and working conditions of the passenger service employees prior to the exhaustion of the dispute resolution procedures of the Railway Labor Act, 45 U.S.C. § 156." *Id.* at 456. In so doing, the District Court overstepped its statutory authority.

As the District Court noted, paragraph Seventh of 45 U.S.C. § 152[4] provides that:

> No carrier . . . shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 156. . . .

The referenced section suspends "intended change[s] in agreements affecting rates of pay, rules, or working conditions" during a waiting period and mediation or an opportunity for mediation by the NMB. 45 U.S.C. § 156.[5] However, as the District Court also noted, the Supreme Court in *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386, 62 S.Ct. 659, 86 L.Ed. 914 (1942), held that the injunctive power granted by Section 6 for the preservation of the status quo is limited by the terms of the Act to those situations in which the status quo reflects a preexisting collective bargaining agreement. The *Williams* case, like case at bar, involved an attempt by the Union to enjoin changes in working conditions when no collective bargaining agreement was in place. That opinion expressly holds:

> The institution of negotiations for collective bargaining does not change the authority of the carrier. The prohibitions of § 6 against change of wages or conditions pending bargaining and those of § 2, Seventh are aimed at prevent-

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4 This section is also referred to hereinafter as "Section 2."

5 This section is also referred to hereinafter as "Section 6."

> ing changes in conditions previously fixed by collective bargaining agreements. Arrangements made after collective bargaining obviously are entitled to a higher degree of permanency and continuity than those made by the carrier for its own convenience and purpose.

Id. at 403, 62 S.Ct. at 669. The District Court recognized this limitation from *Williams* but noted that later Supreme Court cases evidence an erosion in the principle set forth in that case.

In *Detroit and Toledo Shore Line R.R. v. United Transportation Union*, 396 U.S. 142, 90 S.Ct. 294, 24 L.Ed.2d 325 (1969), the Supreme Court considered a case in which a previous collective bargaining agreement was in place but management made unilateral changes in working conditions as to subjects not expressly covered in that agreement. Justice Black, writing for the Court, noted that "[t]he Railway Labor Act was passed . . . to encourage collective bargaining by [carriers] and their employees in order to prevent, if possible, wasteful strikes and interruptions of interstate commerce." *Id.* at 148, 90 S.Ct. at 298 (footnote omitted). He further noted that the status quo provisions of the Act were central to its design and that Sections 5, 6, and 10 "together with § 2 First, form an integrated, harmonious scheme for preserving the status quo from the beginning of the major dispute[6] through the final 30-day 'cooling off' period." *Id.* at 152, 90 S.Ct. at 300. The Court then held that "the status quo extends to those actual, objective working conditions out of which the dispute arose, and clearly these conditions need not be covered in an existing agreement." *Id.* at 153, 90 S.Ct. at 301. The Court then distinguished the *Williams* decision as being one in which there was no pre-existing collective bargaining agreement while the *Detroit and Toledo* situation presented an existing agreement which did not cover the specific working conditions subjected to the unilateral change. At this point, the Court described *Williams* in language that indicated erosion of the precedential force of that decision:

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6 The *Detroit and Toledo* case defines " 'a major dispute' [as] one arising out of the *formation* or change of collective agreements covering rates of pay, rules, or working conditions." *Id.* at 145 n. 7, 90 S.Ct. at 296 n. 7 (emphasis supplied) (citations omitted).

> In *Williams* there was absolutely no prior history of any collective bargaining or agreement between the parties on any matter. Without pausing to comment upon the present vitality of either of these grounds for dismissing the . . . Railway Labor Act claim [in *Williams*] it is readily apparent that *Williams* involved only the question of whether the status quo requirement of § 6 applied. . . .

Id. at 158, 90 S.Ct. at 303. As the District Court notes, this certainly casts some doubt on the continuing willingness of the Supreme Court to follow the *Williams* precedent in a case not factually distinguishable from it. However, *Detriot and Toledo* plainly stops short of overruling *Williams* and leaves it binding in a case like the one before us where there has been "absolutely no prior history of any collective bargaining or agreement between the parties on any matter." *Id.*

Since the *Detriot and Toledo* opinion, the Supreme Court has signaled a further erosion of the *Williams* principle in *Chicago and North Western R.R. v. United Transportation Union*, 402 U.S. 570, 91 S.Ct. 1731, 29 L.Ed.2d 187 (1971). In that case there had been a prior collective bargaining agreement but that agreement had expired and the mediation process was complete. Therefore, like the case at bar, there was no immediately enforceable collective bargaining agreement on any subject. The Union prepared to strike. Management sought to enjoin the Union. Thus, as in the case at bar, one party to the negotiation sought to judicially prevent the other from invoking self-help. The Supreme Court found the substance of the complaint before it to be the Union's alleged failure to perform its obligations under Section 2, First, which imposes upon management and labor the duty "to exert every reasonable effort to *make* and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes. . . ." 45 U.S.C. § 152, First (emphasis supplied). The Court, after weighing the legislative history, determined that Section 2, First, imposed a legal duty upon the parties independent of the duties under Section 6, holding:

> [W]e think it plain that § 2 First, was intended to be more than a mere statement of policy or exhortation to the par-

> ties; rather, it was designed to be a legal obligation, enforceable by whatever appropriate means might be developed on a case-by-case basis.

Id. at 577, 91 S.Ct. at 1735. And, the Court further held that these "appropriate means" could include injunction against a strike. It would seem apparent that the power to enjoin the Union's self-help measure—strikes—implies the concomitant power to enjoin management's self-help measure—a potentially strike-provoking unilateral change in work conditions. This seems particularly true when in each instance the power is aimed at enforcing the same duty arising out of Section 2, First, as quoted above and furthering the congressional goal of maintaining uninterrupted interstate commerce as described by Justice Black.

Therefore, while the legal foundation of the District Court's power to issue an injunction like the one issued here does exist, nonetheless, the *Williams* case holding, though weakened, is not dead. None of the Supreme Court cases cited above and no other case, before or since, has overruled *Williams*. Thus, no power to enjoin unilateral changes in working conditions by management flows from Section 6 of the Act in the absence of pre-existing, in place, collective bargaining agreements. The independent duty found by the court under Section 2, First, in the *Chicago and North Western* case is a limited one. The Court expressly held that the injunctive remedy would be available only "where a strike injunction is the only practical, effective means of enforcing the command of § 2 First." 402 U.S. at 582, 91 S.Ct. at 1738. Plainly the same restrictive test should apply in enjoining self-help by management. In *Burlington Northern R.R. v. BMWE*, ____ U.S. ____, 107 S.Ct. 1841, 95 L.Ed.2d 381 (1987), the Supreme Court underscored the limited circumstances under which this drastic remedy is available stating "[c]ourts should hesitate to fix upon the injunctive remedy . . . unless that remedy alone can effectively guard the plaintiff's right." *Id.* at ____, 107 S.Ct. at 1851 (quoting *International*

Assn. of Machinists v. Street, 367 U.S. 740, 773, 81 S.Ct. 1784, 1802, 6 L.Ed.2d 1141 (1961).[7]

While the District Court's opinion in the case before us does quote the limiting language from *Chicago and North Western R.R.* to the effect that the injunction is "the only practical, effective means" of enforcing a duty imposed by the Railway Labor Act, in this case that finding is not at this time supported by the record. In *Chicago and North Western all* the procedures for negotiations, mediation, and "cooling off" period had been attempted before resort to the injunctive measure. Here, the first steps had not yet been taken when the final leap occurred. Therefore, we are constrained to conclude that so long as *Williams* remains the law, the District Court lacks the power to employ this drastic measure, absent a showing of unavailability or ineffectiveness of other remedies. Thus, as to this assignment of error and this one only, we reverse the decision of the trial court, while affirming that decision in all other particulars. In short, the order of the District Court is affirmed in part, and reversed in part.

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7 *Burlington Northern R.R. v. BMWE* is also one of a long line of cases making plain that the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115, do not prevent the strike injunctions, above discussed, in appropriate limited circumstances. *See, e.g., Chicago and North Western R.R. v. Transportation Union, supra*, 402 U.S. at 581, 91 S.Ct. at 1737, and authorities collected therein.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1987

Filed Feb. 19, 1988

Civil Action No. 86-01912
No. 87-5092

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO

v.

TRANS WORLD AIRLINES, INC.,

Appellant

Civil Action No. 86-02980
No. 87-5093

TRANS WORLD AIRLINES, INC.,

Appellant

DEBORAH K. BOLLER, et al.

v.

NATIONAL MEDIATION BOARD, et al.

Civil Action No. 86-02980
87-5176

TRANS WORLD AIRLINES, INC.,

Appellant

DEBORAH K. BOLLER, et al.

v.

NATIONAL MEDIATION BOARD, et al.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before:

RUTH B. GINSBURG, WILLIAMS, and SENTELLE,
Circuit Judges.

JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in these causes is hereby affirmed in part and reversed in part, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For The Court

/s/ CONSTANCE L. DUPRE
Constance L. Dupre
Clerk

Date: February 19, 1988
Opinion for the Court filed by Circuit Judge Sentelle.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. Nos. 86-1912, 86-2980

Feb. 18, 1987

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO,

Plaintiff,

v.

TRANS WORLD AIRLINES, INC.,

Defendant.

TRANS WORLD AIRLINES, INC., et al.,

Plaintiffs,

v.

NATIONAL MEDIATION BOARD, International Association of Machinists and Aerospace Workers, AFL-CIO,

Defendants.

Joseph Guerrieri, Jr., John A. Edmond, Guerrieri & Sweeney, Washington, D.C., for plaintiff.

Eric Rosenfeld, Ronald A. Lindsay, Seyfarth, Shaw, Fairweather & Geraldson, Washington, D.C., for defendant.

Michael E. Avakian, Washington, D.C., V. Scott Kneese, Dennis Childs, Bracewell & Patterson, Houston, Tex., Robert F. Gore, Springfield, Va., for Deborah K. Boller and Thomas R. Rhoades.

Joseph Guerrieri, Jr., John A. Edmond, Guerrieri & Sweeney, Washington, D.C., Jeffrey P. Manners, Houston, Tex., for International Association of Machinists and Aerospace Workers, AFL-CIO.

Wilma B. Liebman, International Brotherhood of Teamsters, Washington, D.C., for International Brotherhood of Teamsters.

Scott A. Raisher, Jolly, Walsh, Hager & Gordon, Kansas City, Mo., Marvin Peterson, Houston, Tex., for the International Federation of Flight Attendants.

Eric Rosenfeld, Seyfarth, Shaw, Fairweather & Geraldson, New York City, Ronald A. Lindsay, David A. Copus, Washington, D.C., Graham Kerin Blair, Brendan D. Cook, Houston, Tex., for Trans World Airlines, Inc.

MEMORANDUM

OBERDORFER, District Judge.

These two consolidated cases concern union representation of the passenger service employees of Trans World Airlines, Inc. ("TWA"). In Civil Action No. 86-1912, the International Association of Machinists and Aerospace Workers ("IAM") seeks an order requiring TWA to commence bargaining over the wages, rules, and working conditions of the TWA passenger service employees and enjoining TWA from altering the wages, rules, and working conditions that obtained on May 23, 1986. On that date the National Mediation Board ("NMB") certified the IAM as the bargaining representative for TWA's passenger service employees. In Civil Action No. 86-2960, which was originally filed in the United States District Court for the Southern District of Texas, the plaintiffs, including TWA and several individual passenger service employees, seek to set aside the NMB

certification. That suit was transferred to this Court from the Texas Court on August 29, 1986.[1]

I.

The sole issue in Civil Action No. 86-2980 and a threshold question in Civil Action No. 86-1912 is whether this Court should vacate the NMB certification of the IAM as the representative of the TWA passenger service employees. The focus of this issue is the NMB decision to exclude from the representation election TWA passenger service employees who were serving as flight attendants at the time of the election while the regular flight attendants participated in a strike called by the Independent Federation of Flight Attendants ("IFFA").

By a telegram dated February 12, 1986, the NMB authorized a mail ballot election of TWA's passenger service employees. Three unions participated in the election, the IAM, the IFFA and the International Brotherhood of Teamsters ("Teamsters"). The NMB mailed its ballots on March 28, 1986, and scheduled the vote count for April 28, 1986. *Trans World Airlines, Inc.*, 13 NMB 210 (1986). On April 22, 1986, the Teamsters requested that the voting period be extended for two weeks unless the Board deleted from the eligibility lists former passenger service employees who were then employed during an IFFA strike as TWA flight attendants. Representatives of all three unions and TWA met with NMB mediator Joseph Anderson on April 25, 1986, to review the list of eligible voters. A further meeting was held on April 28, 1986. On that date, Mediator Anderson determined that employees working as strike replacements for TWA flight attendants were eligible voters in the passenger service employees' representation election. The Teamsters appealed this determination and the ballots were impounded pending the resolution of the appeal. The Board issued its written decision on May 13, 1986, holding that em-

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1 Civil Action No. 86-2960 was originally two separate suits, *Boller v. NMB*, (C.A. No. H-86-2348) and *TWA v. NMB*, (C.A. No. H-86-2350). These cases were consolidated by Judge Gabrielle K. McDonald in her order transferring them to this Court.

ployees who were working as "contingent flight attendants" were ineligible to vote within the craft or class of passenger service employees. *See Trans World Airlines, Inc.*, 13 NMB 210, 216 (1986). A May 14, 1986 motion for reconsideration of this decision filed by TWA was denied by the Board on May 15, 1986. The next day, the Board counted the mail ballots and on May 23, 1986, it announced that a majority of eligible voters had voted for a union and that the IAM had received a majority of the pro-union votes.[2] 13 NMB 237 (1986). Accordingly, the Board certified the IAM as the authorized representative of the passenger service employees. *Id.* at 238.

It has been established for over 20 years that courts have no authority to review NMB certification decisions in the absence of a showing on the face of the pleadings that the certification decision was a gross violation of the Railway Labor Act or that it violated the constitutional rights of an employer, employee or union. *Brotherhood of Ry. and S.S. Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 658-60, 661-2, 85 S.Ct. 1192, 1196-97, 1198, 14 L.Ed.2d 133 (1965) ("*Railway Clerks*"); *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297, 303, 64 S.Ct. 95, 98, 88 L.Ed. 61 (1943) ("*Switchmen's Union*"); *International Association of Machinists and Aerospace Workers v. National Mediation Board*, 425 F.2d 527, 536 (D.C.Cir. 1970); *International Brotherhood of Teamsters v. Brotherhood of Ry. Airlines and S.S. Clerks*, 402 F.2d 196, 205 (D.C.Cir.) *cert. denied*, 393 U.S. 848, 89 S.Ct. 135, 21 L.Ed.2d 119 (1968) ("*IBT v. BRAC*").

Despite the assiduous efforts of their counsel, plaintiffs have failed to demonstrate either a gross violation of the Act or any violation of the Constitution. Plaintiffs' attempts to characterize this case as one where the NMB has failed to perform its statutory duty to "investigate" a representation dispute are not persuasive. *See* Section 2, Ninth of the Railway Labor Act, 45 U.S.C. § 152, Ninth. For example, TWA purports to find a violation of this statutory obligation to "investigate" in its discov-

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2 Of 4330 eligible employees, 1279 cast votes for the IAM, 935 cast votes for the Teamsters and 36 cast votes for the IFFA. *See* 13 NMB 237, 238 (1986).

ery that some documents which it believes should be in the NMB's file are not there. In addition, the plaintiffs allege that the NMB's determination regarding the contingent flight attendants was erroneous and that the NMB therefore could not have "investigated" the dispute.

There is authority for judicial intervention where the NMB certified a union solely on the basis of signature cards authorizing an election and then refused to investigate the ensuing dispute, *International In-Flight Catering Co. v. National Mediation Board*, 555 F.2d 712, 718 (9th Cir.1977), and where the NMB refused to investigate an individual's application to represent some fellow employees, *Russell v. National Mediation Board*, 714 F.2d 1332 (5th Cir.1983), *cert. denied*, 467 U.S. 1204, 104 S.Ct. 2385, 81 L.Ed.2d 344 (1984). Here, it is undisputed that NMB investigated the representation dispute among TWA's passenger service employees and conducted a mail ballot election. Moreover, the Board also "investigated" the eligibility dispute and issued a written opinion which was based on NMB precedent. *See Chicago and North Western Ry. Company*, 4 NMB 240 (1965); *Trans World Airways, Inc.*, 8 NMB 663 (1981). TWA can not therefore evade the strictures against judicial review of NMB certification decisions by characterizing its complaint about the substance of the Board's decision as a "failure to investigate" claim.

The claims of the individual plaintiffs are no more substantial than those of TWA. These plaintiffs were passenger service employees who responded to TWA's call for volunteers while the permanent flight attendants were on strike and who were still serving as flight attendants when this disputed election occurred. The NMB decision to treat the contingent flight attendants as flight attendants rather than as passenger service employees simply does not inflict injury of a gross or constitutional dimension. Nor is there any merit in these plaintiffs assumption that they would have been ineligible to vote as flight attendants where, as here, the NMB never precluded such participation, and there is no showing that the plaintiffs endeavored to participate in Independent Federation of Flight Attendant affairs. The foregoing disposes of any glimmering claim of plaintiffs that the NMB impaired their First Amend-

ment associational rights. TWA invited the individual plaintiffs to serve as flight attendants and they voluntarily accepted. NMB had no role in the individual plaintiffs serving as flight attendants so that there is no basis for a contention that NMB has any responsibility for plaintiffs being flight attendants at the time of this election for passenger service employees. Nor did the NMB interfere with plaintiffs' associational rights when it determined that plaintiffs' voting rights followed their voluntary change in jobs.

Both TWA and the individual plaintiffs allege that the NMB acted on the basis of an impermissible pro-union bias when it made its decision regarding the contingent flight attendants.[3] It is unclear whether a proven instance of "non-neutrality" would constitute a gross violation of a specific provision of the Railway Labor Act or would be sufficient to transform a disagreement about a Board decision into a constitutional claim. There is no occasion to decide that question, however, because the plaintiffs have failed to proffer any substantial evidence to support this claim. In the absence of such a proffer, they have not demonstrated an error that is "obvious on the face of the papers." *See IBT v. BRAC*, 402 F.2d at 205. Permitting extensive

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3 In particular, TWA alleges that on April 28, 1986, the date the ballots were impounded pending decision on the Teamster's appeal, "it was apparent from the ballot impounding procedure that approximately 2300 ballots had been cast—a number either close to or just shy of the number of ballots necessary for certification of a representative." *See* TWA's Memorandum in Response to NMB's and IAM's Rule 12(b)(6) and Rule 56 Motions for Summary Judgment and NMB's Rule 12(b)(1) Motion to Dismiss at 6. In addition, TWA has alleged that the "NMB and all parties to [the case] were aware that declaring the contingent flight attendants ineligible to vote would reduce the number of potential eligible voters and thereby increase the chances for a Union victory." *See id.* at 6-7. This assertion is difficult to square with the undisputed fact that two of the unions, the IAM and the IFFA, supported the mediator's determination that the contingent flight attendants were eligible to vote. *See also* Individual Plaintiffs' Response in Opposition to Defendants' Motions to Dismiss or for Summary Judgment at 2.

discovery, such as that requested by these plaintiffs,[4] whenever a party alleges a lack of "neutrality" would contradict the Supreme Court's admonition that "the dispute [is] to reach its last terminal point when an administrative finding is made." *Switchmen's Union*, 320 U.S. at 305, 64 S.Ct. at 99. An accompanying order will therefore grant the NMB and IAM motions for summary judgment dismissing the plaintiffs' challenges to the May 23, 1986 Certification.

II.

In Civil Action No. 86-1912, IAM seeks judicial enforcement of legal rights it claims to have been created in it by virtue of its May 23, 1986 certification. Specifically, IAM seeks an order compelling TWA to "treat" with it as bargaining representative of the TWA service employees as required by section 2, Ninth of the Railway Labor Act, 45 U.S.C. § 152, Ninth, and an injunction against any changes in TWA's working rules for these employees which have been effected by TWA since the May 23 certification.

The IAM claim that TWA should have been treating or negotiating with respect to the service employees is firmly grounded in the governing statute. Paragraph Ninth of 45 U.S.C. § 152 provides without equivocation that

> Upon receipt of [a] certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter.[5]

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4 On July 14, 1986, TWA served the NMB and the Teamsters with interrogatories and document requests. In addition, the individual plaintiffs noticed the deposition of Mediator Anderson on October 29, 1986. A November 18, 1986 protective order stayed discovery pending resolution of the dispositive motions filed by the NMB and the IAM. That order is mooted by the resolution of these motions.

5 This refusal to negotiate following certification is not only a clear violation of Section 2, Ninth of the Railway Labor Act; it is also contrary to Section 2, First of the Act which provides, in part, that "[i]t shall be the duty

Despite the clear command of this statute and the clearly expressed congressional intention to limit the role of the judiciary in its administration, TWA has taken the adamant position that it will not negotiate with the IAM, unless and until ordered to do so by a court. An accompanying order will accommodate that demand. While TWA challenged the certification in Texas, it never asked the Texas Court, this Court or any court for leave to delay negotiations. It simply defied the statutory command and took the law into its own hands. In fact, in a remarkably audacious response to an IAM request to begin negotiations, TWA replied:

> In view of the pending proceedings [in Texas] and in order to preserve our full rights to judicial review, it would be inappropriate and, indeed, that (sic) *it may be unlawful*, for TWA to commence bargaining or otherwise deal with the IAM as the representative of the passenger service employees at this time when its representation status is in question. Therefore we intend not to do so until this matter is finally resolved.

Exhibit C to the IAM's Statement of Material Facts as to Which There is no Genuine Dispute at 2 (emphasis added).[6]

While TWA held IAM at bay with its refusal to deal thereby precluding the formation of a collective bargaining agreement with respect to the TWA passenger service employees,[7] it made important unilateral changes in the working conditions of the

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of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions. . . ." 45 U.S.C. § 152, First. Furthermore, there is a strong argument that this conduct is in violation of Section 2, Fourth, which guarantees that "[n]o carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees. . . ." 45 U.S.C. § 152, Fourth.

6 At oral argument, TWA's counsel was unable to supply any authority for this flat contradiction of the language of the statute.

7 IAM and TWA have for many years had a collective bargaining agreement with respect to thousands of other TWA employees.

IAM represented service employees. Specifically, TWA gave flight attendants a role in passenger pre-boarding, a change that, however desirable as an economy or an efficiency, would have been clearly bargainable if a collective bargaining agreement had been in place. TWA's ability to proceed unilaterally was enhanced by the delay in the decision of the Texas Court to transfer the certification case to this Court, and by a frivolous appeal of that transfer order filed by the individual plaintiffs. Under these circumstances, this Court was reluctant to act on IAM's prayer for interlocutory relief while responsibility for the certification case was in limbo. In retrospect, IAM had established its entitlement to an order compelling negotiation as of July 8, 1986, when it applied for a temporary restraining order. Whether this situation can be rectified remains to be seen. It is clear that an order compelling TWA to negotiate with the union in good faith should be entered now. *See Virginian R.R. Co. v. System Fed. No. 40*, 300 U.S. 515, 544-45, 57 S.Ct. 592, 597-98, 81 L.Ed. 789 (1937); *Railway Clerks*, 380 U.S. at 658, 85 S.Ct. at 1196; *Aeronautical Radio, Inc. v. National Mediation Board*, 380 F.2d 624, 627 (D.C.Cir.), *cert. denied*, 389 U.S. 912, 88 S.Ct. 237, 19 L.Ed.2d 259 (1967).

III.

IAM's prayer for a further order re-establishing working conditions as they existed on May 23, 1986, when it was certified poses a more difficult question. Paragraph Seventh of 45 U.S.C. § 152 provides that:

> No carrier . . . shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 156. . . .

Section 156 suspends "intended change[s] in agreements affecting rates of pay, rules, or working conditions" during a waiting period and mediation or an opportunity for mediation by the NMB. 45 U.S.C. § 156. In *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386, 400-03, 62 S.Ct. 659, 668-69, 86 L.Ed. 914 (1942), the Supreme Court limited judicial authority to preserve

working conditions in *status quo* under section 156 to conditions embodied in pre-existing collective bargaining agreements. The potential scope of the holding in *Williams* was substantially narrowed in the later case of *Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 90 S.Ct. 294, 24 L.Ed.2d 325 (1969), in which the Court held that the "status quo extends to those actual objective working conditions out of which the dispute arose" and that "these conditions need not be covered in an existing agreement." *Id.* at 153-54, 90 S.Ct. at 301. The *Detroit & Toledo Shore Line* Court therefore required that an employer comply with the status quo requirements of Section 156 during a dispute over a condition of employment that was not covered in its existing collective bargaining agreement with the union. In reaching this conclusion, the Court noted that "[t]he Act's status quo requirement is central to its design." *Id.* at 150, 90 S.Ct. at 299.

The philosophy of *Detroit & Toledo Shore Line* is clearly at odds with the reasoning in *Williams*. However, the *Detroit & Toledo Shore Line* Court did not "paus[e] to comment upon the present validity" of *Williams* and distinguished that case on the grounds that there was "absolutely no prior history of any collective bargaining or agreement between the parties on any matter." *Id.*, 396 U.S. at 158, 90 S.Ct. at 303. *Williams* therefore precludes the relief sought by IAM with respect to changes in working conditions heretofore effected.

The Court has considered whether it is authorized, despite *Williams*, to enjoin *future* changes in the status quo, now that TWA is firmly obligated to commence bargaining with the IAM.[8] In this case, unlike *Williams*,[9] it is established and the Court has found that TWA's failure to commence negotiations on or about May 23, 1986, when the NMB certified the IAM, is

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8 It is undisputed that such changes are planned by TWA. For example, TWA has issued a memorandum notifying all personnel that the position of "reservation agent-in-charge" is being eliminated. *See* Exhibit A to the Declaration of Timothy Connally (attached to the IAM's Reply Memorandum). These employees are within the passenger service craft or class.

9 In *Williams*, the union and the employer successfully negotiated a collective bargaining agreement after the union's request for negotiations. *See* 315 U.S. at 402, 62 S.Ct. at 668.

a clear violation of the law. If TWA had complied with its statutory obligation to treat with the IAM in a reasonable time after certification, the collective bargaining waiting period and mediation process created by the statute would have been well advanced, if not completed, by now. These circumstances require an order barring any further changes in wages, rules and working conditions outside the collective bargaining/mediation process prescribed in the Railway Labor Act's *status quo* provisions. This result is thoroughly consistent with *Williams* as illuminated by *Detroit & Toledo Shore Line*. The injunction requiring negotiations will emphasize the good faith obligation imposed by Paragraph Seventh of 45 U.S.C. § 152 by barring further unilateral changes in working conditions and other interference with the IAM's performance of its representation responsibilities.

Finally, the Court must consider whether its authority to issue such relief is barred or constrained by the provisions of the Norris-LaGuardia Act, 29 U.S.C. §§ 101 *et seq*. Section 4 of that Act provides that certain actions arising out of labor disputes shall not be subject to injunction. TWA's attempt to characterize its unilateral changes in working conditions as one of these unenjoinable acts is unsupported by citations to case law and is utterly unconvincing.[10] Moreover, it has long been established that the requirements of the Norris-LaGuardia Act must be accommodated to the specific provisions of the Railway Labor Act, *see Brotherhood of R.R. Trainmen v. Chicago River and Indiana R.R. Co.*, 353 U.S. 30, 40-42, 77 S.Ct. 635, 640-42, 1 L.Ed.2d 622 (1957), and that the judiciary is empowered to issue an injunction when it is "the only practical, effec-

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10 For example, TWA asserts that it is protected from a status quo injunction by 29 U.S.C. § 104(d) which forbids an injunction prohibiting any person from "aiding any person participating or interested in any labor disputes, who . . . is prosecuting . . . any action or suit in any court of the United States." *See* TWA's Memorandum in Opposition to the IAM's Motion for Summary Judgment Ordering TWA to Restore and Maintain "Status Quo" at 30. TWA claims that an order requiring it to maintain current working conditions would somehow prohibit it from aiding the individual plaintiffs in this lawsuit. *Id*. It is unclear how TWA believes that altering the current working conditions "aids" these passenger service employees unless it is by weakening the authority of the union.

tive means" of enforcing a duty imposed by the Railway Labor Act. *Chicago & North Western Ry. Co. v. United Transp. Union*, 402 U.S. 570, 582, 91 S.Ct. 1731, 1737, 29 L.Ed.2d 187 (1971). In this case, it is undisputed that TWA has consistently refused to bargain with the certified representative of its passenger service employees. Indeed, it has taken the untenable position that it would be unlawful to bargain before judicial review of the certification has run its course, presumably through this Court, the Court of Appeals and the certiorari process of the Supreme Court. TWA has thereby extended the power to alter working conditions under *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386, 62 S.Ct. 659, 86 L.Ed. 914 (1942), well beyond the time contemplated by any plausible interpretation of the Railway Labor Act. An injunction requiring TWA to commence bargaining and prohibiting any further unilateral changes is therefore the only "practical, effective means" of protecting the employees' rights to organize and bargain collectively under the Act and such an injunction may therefore be issued despite the anti-injunction provisions of the Norris-LaGuardia Act.

TWA argues in the alternative that this Court must follow certain procedural requirements of the Norris-LaGuardia Act before issuing any injunctive relief. They invoke section 7 of that Act which provides, in part, that

> No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute . . . except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—
>
> (a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained . . . ;
>
> (b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

29 U.S.C. § 107. TWA argues that this provision requires this Court to hold an evidentiary hearing before issuing any injunctive relief. At that hearing, it could be anticipated that TWA would offer testimony on the issues of fact specified by the Norris-LaGuardia Act, namely, whether this action threatens substantial and irreparable injury to [IAM's] "property" and whether the injury to TWA posed by such an injunction is greater than the injury that will be inflicted on the IAM if relief is denied. *See* TWA's Rule 108(h) Statement of Material Facts Necessary to be Litigated at 13.

TWA has cited no case holding that this Court is required to hold such a hearing or make these findings before ordering an employer to perform the duties prescribed in the Railway Labor Act. Indeed, such a decision would violate the principle, firmly established by the Supreme Court, that the explicit provisions of the Railway Labor Act take precedence over the commands of the Norris-LaGuardia Act. This rule of interpretation does not apply exclusively to the prohibition of injunctions contained in Norris-LaGuardia Act Section 4. In *Virginian R.R. Co. v. System Fed. No. 40*, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789 (1937), for example, an employer challenged a trial court order requiring it to treat with a union certified pursuant to the Railway Labor Act on the ground that the order did not comply with section 9 of the Norris-LaGuardia Act.[11] The Supreme Court held that

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11 That section provides, in part, that

No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on

> The evident purpose of [section 9], as its history and context show, was not to preclude mandatory injunctions, but to forbid blanket injunctions against labor unions, which are usually prohibitory in form, and to confine the injunction to the particular acts complained of and found by the court. We deem it unnecessary to comment on other similar objections, except to say that they are based on strained and unnatural constructions of the words of the Norris-LaGuardia Act, and conflict with its declared purpose, section 2 (29 U.S.C.A. § 102), that the employee "shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

300 U.S. at 563, 57 S.Ct. at 606. *Virginian Railroad Co.* therefore requires that the procedural provisions of the Norris-LaGuardia Act be read in light of that Act's stated policies and that these provisions can not be construed to conflict with the relief authorized under the Railway Labor Act. In this case, no valid purpose would be served by holding the evidentiary hearing contemplated in section 7 of the Norris-LaGuardia Act. The facts central to this Court's ruling, i.e., that TWA has refused to negotiate with the certified representative of its employees and has altered the terms and conditions of employment, are not in dispute. Moreover, the required findings of fact contained in section 7 are simply inapplicable in this case where a union seeks to compel an employer to comply with the commands of the Railway Labor Act. The Norris-LaGuardia Act's policy of protecting the rights of "the individual, unorganized

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> the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided in this chapter.

worker" to "full freedom of association, self-organization, and designation of representatives of his own choosing to *negotiate the terms and conditions of his employment*" (emphasis added) would be ill served by further postponing the resolution of this matter in order to hold a time-consuming evidentiary hearing. 29 U.S.C. § 102. Moreover, it is inconceivable that Congress intended to permit a union to enforce the rights explicitly granted to it under the Railway Labor Act only upon a showing that denial of enforcement would result in "irreparable harm" to the union's "property." For these reasons, TWA's contention that the provisions of section 7 of the Norris-LaGuardia Act must be satisfied in this case must be rejected. *Accord Brotherhood of R.R. Carmen of America, Local No. 429 v. Chicago & North Western Ry. Co.*, 354 F.2d 786, 796 (8th Cir.1965); *Local 553, Transport Workers Union of America v. Eastern Air Lines, Inc.*, 544 F.Supp. 1315, 1329-31 (E.D.N.Y.1982), *aff'd in relevant part*, 695 F.2d 668, 678-79 (2d Cir.1982).

ORDER

I.

Consolidated Civil Action No. 86-2980 comes before the court on the International Association of Machinists and Aerospace Workers' ("IAM") Motion for Summary Judgment and the National Mediation Board's Motion to Dismiss, or in the Alternative, for Summary Judgment. For the reasons stated in the accompanying memorandum, it is this 18th day of February, 1987, hereby

ORDERED: that the IAM's Motion for Summary Judgment and the NMB's Motion to Dismiss, or in the Alternative, for Summary Judgment, should be, and are hereby, GRANTED; and it is further

ORDERED: that the complaints in consolidated Civil Action No. 86-2980 should be, and are hereby, DISMISSED.

II.

Civil Action No. 86-1912 is before the court on the IAM's motion for injunctive relief. The undisputed material facts of record establish that Trans World Airlines, Inc., ("TWA") has refused to negotiate with the IAM over the wages, rules and working conditions of its passenger service employees despite a May 23, 1986 certification by the National Mediation Board. This refusal to negotiate with the duly certified representative of its employees violates Section 2, First, Fourth and Ninth of the Railway Labor Act, 45 U.S.C. § 152, First, Fourth and Ninth. This unlawful behavior has extended unreasonably the time during which TWA is privileged to unilaterally alter the working conditions of its employees under *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386, 62 S.Ct. 659, 86 L.Ed. 914 (1942). Accordingly, it is hereby

ORDERED: that Trans World Airlines, Inc., its officers, agents and assigns shall treat with the IAM as the certified collective bargaining representative of the craft and class of passenger service employees, pursuant to Section 2, Ninth of the Railway Labor Act, 45 U.S.C. § 152, Ninth, and it is further

ORDERED: that Trans World Airlines, Inc., its officers, agents and assigns, shall henceforth be enjoined from making any further unilateral changes in the wages, rules and working conditions of the passenger service employees prior to the exhaustion of the dispute resolution procedures of the Railway Labor Act. 45 U.S.C. § 156.

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

13 NMB No. 63
Case No. R-5610

May 13, 1986

In the matter of the Application of the

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO

alleging a representation dispute pursuant to Section 2, Ninth, of the Railway Labor Act

involving employees of

TRANS WORLD AIRLINES, INC.

DETERMINATION OF ELIGIBILITY-ORDER

On January 9, 1986, the International Association of Machinists & Aerospace Workers, AFL-CIO (IAM&AW) filed an application pursuant to Section 2, Ninth, of the Railway Labor Act, 45 U.S.C. § 2, Ninth, alleging the existence of a representation dispute among personnel described as "Passenger Service Employees" of Trans World Airlines, Inc. (TWA). Said application was docketed as NMB Case No. R-5610. Later that day, the International Brotherhood of Teamsters (IBT) filed an application. The Independent Federation of Flight Attendants (IFFA), on January 21, 1986, filed an application to represent these employees.

At the time the applications were filed, these employees were not represented by any individual or organization.

The Board assigned Board Representative Joseph E. Anderson to investigate.

On February 12, 1986, the Board found a dispute to exist. A mail ballot election was authorized with the count to be conducted in Washington, D.C. The ballots were mailed on March 28, 1986, with the count scheduled for April 28, 1986.

On April 25, 1986, representatives of the IBT, IAM&AW, IFFA and TWA met with Mr. Anderson for the purpose of reviewing the list of eligible voters. These representatives met with Mr. Anderson again on April 28, 1986.

Mr. Anderson, on April 25 and 28, 1986, issued several eligibility determinations. Several of these determinations were appealed by the IBT. The IAM&AW and TWA responded to the IBT's appeal on May 2, 1986. In its letter, one of the issues that the IAM&AW appealed was Mr. Anderson's determination that John W. Busch is eligible. IFFA, on April 28, 1986, submitted a written response to only the question of the eligibility of the "contingent flight attendants." The ballots were impounded by the Board pending consideration of the IBT's appeal.

On May 2, 1986, the IBT supplemented its appeal. The IBT also appealed to Mr. Anderson to include three individuals, John Busch, Denise Massei and Vicki Joseph.

ISSUES

Based on the Board's investigation of the appeal filed by the IBT and the IAM&AW, the issues are as follows:

1. Whether employees temporarily working outside the craft or class as "contingent flight attendants" are eligible voters; and
2. If the above employees are determined to be eligible, whether the voting period should be extended by two weeks; and
3. Whether the Scheduled Airline Traffic Office (SATO) employees are eligible voters; and
4. Whether the name of all individuals for whom ballots were returned to the Board as undeliverable should be removed from the eligibility list; and

5. Whether all employees on medical leave for more than two years are eligible voters; and
6. Whether all employees on furlough for more than two years are eligible voters; and
7. Whether Earl Trout, John Busch, Denise Massei and Vicki Joseph are eligible voters.

CONTENTIONS

The IBT contends that the subject "contingent flight attendants" are ineligible because they are working outside of the craft or class. The IBT asserts that the "controlling factor" is the "present status" of these individuals. Their expectation of return to the passenger service craft or class, the IBT argues, is speculative and "Board precedent dictates their exclusion since their present status is determinative." TWA argues that the employees are temporarily working as flight attendants and will be returned to the passenger service craft or class as permanent flight attendants are hired and trained. It is the position of the IAM&AW and IFFA that these employees are eligible.

The IBT argues that the voting period should be extended two weeks if the Board determines that the "contingent flight attendants" are eligible. This extension, the IBT contends, is necessary in order to give the organizations "an opportunity to communicate with these individuals and to give them an opportunity to vote." The IAM&AW is opposed to any extension of the voting period.

It is the IBT's position that all SATO employees should be removed from the eligibility list. It is this organization's understanding that these individuals will become employees of a separate corporation named SATO, Inc., on May 1, 1986. TWA contends that the SATO employees are eligible. TWA admits that a corporation has been formed but states that all present SATO employees will remain employees of TWA and that future personnel will be hired as employees of SATO, Inc. The IAM&AW argues that SATO employees are eligible.

The IBT seeks to remove from the eligibility list the names of all employees for whom ballots were returned to the Board as

undeliverable. The IBT asserts that since these employees have not received a ballot, leaving them on the list, "imputes a 'no' vote without reason." In support of this request, the IBT cites *Continental Airlines*, 11 NMB 46 (1984). TWA contends that it is the employee's obligation to notify the Carrier of any change in residence. The Carrier asserts that "it can only be concluded that they have chosen not to vote in this election" because notices have been posted informing employees of the election. The IAM&AW argues that the names of these individual should be removed because "basic notions of fairness require that rather than being counted as a procompany or no-union vote which [would] be the practical effect of continuing to treat those employees as eligible voters, they should not be counted for any purpose whatsoever."

The IBT argues that all employees on medical leave for more than two years are ineligible because they have no reasonable expectation of returning to work. TWA asserts that the Carrier has a "five-year return policy" for employees on medical leave and that employees on such leave are eligible. The IAM&AW contends that these employees are eligible.

The IBT contends that employees who are furloughed for more than two (2) years should be ruled ineligible because these employees have no reasonable expectation of returning to work. TWA states that employees have recall rights for a five year period and that the policy is systemwide. It is the position of the IAM&AW that these employees are eligible.

Finally, the IBT contends that Earl Trout III is ineligible because he was working outside of the craft or class on the cut-off date. The IAM&AW and the IBT assert that John Busch is ineligible. The IAM&AW contends that Busch became a permanent flight attendant on May 6, 1986. The IBT asserts that Busch was a "contingent flight attendant" on the date of the appeal. Denise Massei, the IAM&AW argues, is ineligible because she is presently in training to become a permanent flight attendant. The IBT argues that Vicki Joseph was terminated on March 24, 1985, and is ineligible. TWA and IFFA did not submit any information on the eligibility of Trout, Busch, Massei and Joseph.

FINDINGS OF LAW

Determination of the issues here involved is governed by Section 201, Title II, and Section 2, Title I, of the Railway Labor Act, as amended, 45 U.S.C. § 152 *et seq.* Accordingly, the Board finds as follows:

I.

Trans World Airlines is a common carrier by air as defined in Title II, Section 201, of the Act, 45 U.S.C. § 181.

II.

Section 2, Fourth, of the Act, 45 U.S.C. § 152, Fourth, gives employees subject to its provisions ". . . the right to organize and bargain collectively through representatives of their own choosing". The majority of any craft or class of employees shall have the right to determine who shall be the representatives of the craft or class for the purposes of this Act.

III.

Section 2, Ninth, of the Act, 45 U.S.C. § 152, Ninth, requires the National Mediation Board to investigate disputes which arise among a carrier's employees over representation, and to certify the duly authorized representatives of such employees. In determining the choice of the majority of employees under this section, the Board is required to designate who may participate as eligible voters in the event an election is required.

IV.

The IAM&AW, IBT, and IFFA are labor organizations and representatives as provided by Section 1, Sixth, 45 U.S.C. § 151, Sixth and Section 2, Ninth, 45 U.S.C. § 152, Ninth, of the Act.

DISCUSSION

I.

In the present case, the key date for eligibility purposes is the count date of April 28, 1986. The Board stated in *Chicago & North Western Railway Company*, 4 NMB 240 (1965) that:

> In representation disputes the Act deals with the present status and the present interest of the employees involved and not with potential future status and potential future interests of the employees. The Board has long adhered to the established and recognized practice to vote employees in the one craft in which they are employed at the time of the election.

In the previous TWA case involving the craft or class of Passenger Service Employees, NMB Case No. R-5163, the Board considered the eligibility of TWA employees who were working in another craft or class. In *Trans World Airways, Inc.*, 8 NMB 663 (1981), the Board stated:

> Under TWA's employment system, a furloughed employee may be 'rehired' in a different job and still retain recall rights to his original position. However, this does not alter the basic fact that the employee is still a TWA employee, and is employed in a position outside of the craft or class. These employees have a present interest in their present craft or class whether on the cut-off date or currently, rather than their former craft or class. Therefore, employees working in other crafts or classes either on the cut-off date or at the present time are ineligible.

For the above reasons, the Board finds that all employees working as "contingent flight attendants" on April 28, 1986, are ineligible to vote in NMB Case No. R-5610.

II.

Because of the above finding, it is unnecessary for this Board to rule upon the IBT's request to extend the voting period.

III.

The SATO employees are presently employees of TWA and are eligible voters. *See Chicago & North Western Railway Company.*

IV.

The Board has carefully considered the IBT's request to remove from the eligibility list the names of all individuals for whom ballots were returned to the Board as undeliverable. The Board notes that the facts in the present case differ from those in *Continental Airlines*, 11 NMB 46 (1983). Continental Airlines was undergoing at that time a curtailment of operations and had filed a petition in bankruptcy. The Board noted the disruptive effect of the bankruptcy and other personnel actions in 1983 on its ability to conduct a mail ballot election.

Based on the record before the Board in this case, the Board finds no reason to grant such an unusual request.

V.

It is stated in the Carrier's position statement that TWA has a five-year return policy for employees on medical leave. According to Section 5.306 of the NMB Representation Manual, employees on "authorized sick leave" are eligible. For these reasons, the Board finds that Mr. Anderson's determination was made in accordance with Board procedure and policy and is correct.

VI.

The Carrier has a five-year policy regarding furloughs. These employees have systemwide recall rights. Section 5.305 of the NMB Representation Manual states:

> Furloughed employees are considered eligible in the craft or class in which they last worked provided they retain an employer-employee relationship and have a reasonable expectation of returning to work.

The Board finds that these employees are eligible on the foregoing basis.

VII.

In reference to Earl Trout, the Board finds that there is insufficient evidence in the record to warrant a finding that this individual is ineligible.

VIII.

The IAM&AW and the IBT have appealed the eligibility of John W. Busch. If the Carrier's records reveal that Mr. Busch was a "contingent flight attendant" on April 28, 1986, he is ruled ineligible in accordance with the above findings.

The IBT has appealed the eligibility of Denise Massei contending that she is in training to become a permanent flight attendant. The same ruling applies to Massei.

The Board finds that the IBT has presented insufficient evidence to warrant reversal of Mr. Anderson's determination of eligibility regarding Vicki Joseph.

CONCLUSION AND ORDER

The Board finds that all employees working as "contingent flight attendants" or otherwise assigned to the position of "contingent flight attendant" on April 28, 1986 are ineligible. SATO employees are eligible voters in this case. All employees on medical leave or furlough are eligible. Earl Trout and Vicki Joseph are eligible. John Busch and Denise Massei are ineligible if the Carrier's record reveals that these individuals were "contingent flight attendants" on April 28, 1986.

The IBT's request to remove the names of all individuals for whom ballots were returned is denied.

It is ordered that the ballots previously impounded pending consideration of this appeal be counted at 11:00 a.m. on May 16, 1986. TWA is ordered to furnish the Board Representative with the names of all employees on the eligibility list who were working as "contingent flight attendants", or otherwise assigned to the position of "contingent flight attendants" on April 28, 1986, by 1:00 p.m. on May 15, 1986.

By direction of the NATIONAL MEDIATION BOARD.

/s/ CHARLES R. BARNES
Charles R. Barnes
Executive Director

Copies to:

John T. Weise, Esq.
Mr. William W. Winpisinger
Mr. William F. Genoese
Ms. V. L. Frankovich
Mr. William Scheri
Wilma Liebman, Esq.
Mr. William Hoffman
Mr. John Gaiser

CRB/rwb

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

13 NMB No. 64
May 15, 1986

John Weise, Esq.
Seyfarth, Shaw, Fairweather & Geraldson
55 East Monroe Street
Chicago, IL 60603

Re: NMB Case No. R-5610
Trans World Airlines (TWA)

Dear Mr. Weise:

This letter will confirm a telex forwarded to you on May 15, 1986.

This will acknowledge the "Carrier's Motion For Reconsideration of NMB Eligibility Order and Carrier's Motion for Related Relief." TWA Requests that the National Mediation Board (Board) "Reconsider and Reverse" its decision in *Trans World Airlines*, 13 NMB 63 (1986). In that decision, the Board found that all employees working as "contingent flight attendants" on April 28, 1986 are ineligible voters.

TWA has not presented any new evidence in support of its appeal. The Carrier has merely presented arguments in support of its previous position that these employees are eligible. The Board finds that TWA has not presented any new evidence to warrant reversal of its finding concerning the ineligibility of the "contingent flight attendants." The Carrier's Motion For Reconsideration is denied.

In *Trans World Airlines*, *supra*, the Board ordered TWA to furnish the names of all employees working as "contingent flight attendants" on April 28, 1986. In its Motion, TWA has set certain conditions upon the submission of this information. The Board finds that these conditions are totally unacceptable and inconsistent with the Carrier's prior position. In its position statement submitted on May 5, 1986, the Carrier stated that

"the only circumstance under which the Board should reveal these employees' names to the Unions is if and when it determines that such individuals are ineligible to vote in this election. At that point the Board would be obligated to notify the parties of any changes in the eligibility list." After the names have been stricken from the eligibility list, the Board Representative will update the Organizations on the current eligibility list in accordance with Board procedures.

TWA contends that the date for eligibility purposes is May 16, 1986. The Board found in *Trans World Airlines, supra*, that the appropriate date is April 28, 1986. As the Board stated in *Altair Airlines, Inc.*, 7 NMB 489 (1980), "when the ballots in an election are impounded because of a question which requires resolution prior to the count, and the impounding results in a delay of the count beyond the count date set in the notice and rules of election, the status quo as it existed on the original count date must be preserved in order to prevent any change in the outcome as it would have been in the absence of the delay."

TWA's request to impound any ballots submitted by the "contingent flight attendants" is denied.

For the above reasons, the "Carrier's Motion For Reconsideration of NMB Eligibility Order and Carrier's Motion For Related Relief" is denied. TWA is cautioned that in *United States of America v. Trans World Airlines*, (D.D.C. Misc. No. 86-0054), filed February 14, 1986, the Department of Justice concluded that "TWA's failure to provide the information required by the Board's Order . . . constitutes a violation" of the Railway Labor Act. The Board expects TWA to comply with its Order in *Trans World Airlines, supra*, by 1:00 p.m., E.D.T., May 15, 1986.

Sincerely,

/s/ CHARLES R. BARNES
Charles R. Barnes
Executive Director

Copies to:

Mr. William F. Genoese
Mr. William W. Winpisinger
Ms. V. L. Frankovich
Mr. William L. Scheri
Wilma Liebman, Esq.
Mr. John Gaiser

CRB/rwb

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

13 NMB No. 72
Case No. R-5610

May 23, 1986

In the matter of the

REPRESENTATION OF EMPLOYEES

of

TRANS WORLD AIRLINES, INC.

Passenger Service Employees

CERTIFICATION

The services of the National Mediation Board were invoked by the International Association of Machinists & Aerospace Workers, AFL-CIO (IAM&AW), on January 9, 1986, to investigate and determine who may represent for the purposes of the Railway Labor Act, as provided by Section 2, Ninth, thereof, personnel described as "Passenger Service Employees", employees of Trans World Airlines, Inc. Later that day, the International Brotherhood of Teamsters (IBT) filed an application. The Independent Federation of Flight Attendants (IFFA), on January 21, 1986, filed an application to represent these employees.

At the time this application was received, these employees were not represented by any organization or individual.

The Board assigned Board Representative Joseph E. Anderson to investigate.

FINDINGS

The investigation disclosed that a dispute existed among the craft or class of Passenger Service Employees and by direction of the Board the Board Representative was instructed to conduct an election by secret ballot to determine the employees' representation choice.

The following is the result of the election as reported by Board Representative Anderson who was assigned to count the ballots in this case.

Number of Employees Voting:

IAM&AW	*IBT*	*IFFA*	*Void Ballots*	*Number of Employees Eligible*
Pass. Serv. Emp. 1279	935	36	22	4330

The National Mediation Board further finds that the Carrier and employees in this case are, respectively, a Carrier and employees within the meaning of the Railway Labor Act, as amended; that this Board has jurisdiction over the dispute involved herein; and that the interested parties, as well as the Carrier, were given due notice of the Board's investigation.

CERTIFICATION

NOW, THEREFORE, in accordance with Section 2, Ninth, of the Railway Labor Act, as amended, and based upon its investigation pursuant thereto, the National Mediation Board certifies that the International Association of Machinists and Aerospace Workers, AFL-CIO has been duly designated and authorized to represent for the purposes of the Railway Labor Act, as amended, the craft or class of Passenger Service Employees, employees of Trans World Airlines, Inc.

By direction of the NATIONAL MEDIATION BOARD.

/s/ CHARLES R. BARNES
Charles R. Barnes
Executive Director

CRB/rwa

RAILWAY LABOR ACT, 45 U.S.C. §§ 151-188

Section 2. First — Duty of carriers and employees to settle disputes. [45 U.S.C. § 152, First]

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Section 2. Fourth — Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden. [45 U.S.C. § 152, Fourth]

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter

shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during work hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Section 2. Ninth Disputes as to identity of representatives; designation by Mediation Board; secret elections. [45 U.S.C. § 152, Ninth]

If any dispute shall arise among a carrier's employees as to who are representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representatives so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed

necessary by it to carry out the purposes and provisions of this paragraph.

Section 6. Procedure in changing rates of pay, rules, and working conditions. [45 U.S.C. § 156]

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

REPRESENTATION MANUAL

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NATIONAL MEDIATION BOARD
REPRESENTATION MANUAL
Revised Edition—Effective November 1, 1985

§ 3.1 *Board Representative's Objective*

During the processing of a representation case, the Board representative's function is to investigate any question concerning representation in accordance with the instructions of this manual and such directives as the Board may issue. The carrier is not a party to a representation dispute and has no right to participate as a party in the investigation of such a dispute. It is necessary that the Board representative conduct the investigation with extreme impartiality, thoroughness and accuracy. Detailed reporting, on a daily basis, is normally required in all cases.

* * *

§ 3.503-5 *Cut-Off Date*: The list of potential eligible voters should contain all individuals with employee-employer relationships as of the last day of the last payroll period prior to the initial scheduling of this dispute for investigation.

* * *

§ 5.302 *Temporary Employees*

It is established NMB policy that only those employees with a present interest regarding the craft or class in dispute are eligible to vote in an NMB representation election. Such policy is implemented with respect to temporary employees by examining whether or not the employees in question have a reasonable expectation of continued employment in the craft or class.

§ 5.303 *Working In Another Craft or Class*

Employees who are working regularly in another craft or class on the same carrier will be considered

ineligible to participate in the craft or class involved in the Board representative's investigation.

* * *

§ 5.305 *Furloughed Employees*

Furloughed employees are considered eligible in the craft or class in which they last worked provided they retain an employer-employee relationship and have a reasonable expectation of returning to work.

§ 5.306 *Leave of Absence*

An employee on authorized leave of absence, including military leave, from the craft or class in dispute who is neither working in another craft or class, working for the carrier in an official capacity nor working for another carrier, will be considered eligible in the craft or class involved in the investigation. For example, an employee upon authorized leave of absence for labor organization activities will be considered eligible, as well as an employee who is on authorized sick leave.

Where the question of leave of absence is contested, the Board representative should require supporting documents to verify that a bona fide leave of absence is in effect.

§ 15.0 *TIME LIMITS ON REPRESENTATION APPLICATIONS*

§ 15.2 *Applicable Board Rules*

NMB Rules, Part 1206.4 [29 C.F.R. § 1206.4], governing representation bar procedures provide as follows:

"Except in unusual or extraordinary circumstances, the National Mediation Board will not accept an application for investigation of a representation dispute among employees of a carrier:

* * *

(b) For a period of one (1) year from the date on which:

(1) The Board dismissed a docketed application after having conducted an election among the same craft or class of employees on the same carrier and less than a majority of eligible voters participated in the election;

* * *

FORM NMB-R-1 APPENDIX NO. 2

UNITED STATES OF AMERICA
NATIONAL MEDIATION BOARD
NOTICE AND RULES OF ELECTION

(City & State) (CASE NO.) (Date)

TO ALL CONCERNED:

This notice of election to be held under the Railway Labor Act involves the following:

(Craft or Class)

OF

(Carrier)

SOUGHT TO BE REPRESENTED BY:
(Applicant)

AND PRESENTLY

(Represented by _____/ Unrepresented)

COUNT OF BALLOTS:

(Time, Date and Place)

When applicable, a ballot box voting schedule is attached hereto and made a part hereof.

(Board Representative's name)

BOARD REPRESENTATIVE, NATIONAL MEDIATION BOARD,
WASHINGTON, D.C. 20572

THIS IS THE ONLY OFFICIAL NOTICE OF THE ELECTION AND MUST NOT BE DEFACED BY ANYONE.

UNITED STATES OF AMERICA
NATIONAL MEDIATION BOARD

NOTICE AND RULES OF ELECTION

NOTICE

An election, pursuant to Section 2, Ninth of the Railway Labor Act, will be conducted by secret ballot under the supervision of the Board Representative, whose name is affixed hereto, among the eligible voters described on the attachment to this NOTICE OF ELECTION, to determine the question of representation presently before the NATIONAL MEDIATION BOARD.

Section 2, Fourth, of the Railway Labor Act, provides that "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act."

The Railway Labor Act further provides that elections shall be free from interference, influence or coercion, and that it is unlawful for a carrier to interfere with the organization of its employees. Electioneering will not be permitted within the voting area perimeters established by the Board Representative.

Violations should be reported immediately to the Board Representative or the NATIONAL MEDIATION BOARD, Washington, D. C. 20572.

RULES OF ELECTION

BALLOTING

Balloting will be conducted in the manner prescribed in the attached NOTICE OF ELECTION. In the event the election is conducted by United States Mail, official secret ballots

will be mailed by the Board Representative to the eligible voters. Instructions for voting by mail will be included with each ballot. SHOULD ANY ELIGIBLE VOTER FAIL TO RECEIVE A BALLOT WITHIN A REASONABLE TIME, SUCH VOTER SHOULD PERSONALLY REPORT THE FACT TO THE BOARD REPRESENTATIVE IN CARE OF THE NATIONAL MEDIATION BOARD, WASHINGTON, D.C. 20572.

ELIGIBILITY

All employees in the craft(s) or class(es) referred to in this NOTICE OF ELECTION who appear on the payroll of the carrier during the designated period and who retain an employment relationship with the carrier on the date the vote is taken, and those individuals with rights to recall, not appearing on the above mentioned payroll, whose last service performed was in the involved craft or class are eligible to vote.

A dismissed individual whose request for reinstatement, alleging wrongful dismissal, is pending before proper authorities (including the National Railroad Adjustment Board, other appropriate Boards, or any court of competent jurisdiction) is eligible to participate. A dismissed employee whose guilt has been determined, and who is seeking reinstatement on a leniency basis is not eligible.

VOTERS LIST

A list of the eligible voters has been prepared by the Board Representative, based upon information furnished by the carrier, and opportunity has been afforded party representatives to review the list. Only those individuals whose names appear on the list will be permitted to vote, except that upon proof of error, such error will be corrected.

SUPERVISION OF ELECTION

The Board Representative is personally responsible to the National Mediation Board for the conduct of the election. Only the Board Representative and an individual voter will be allowed to handle the ballot in order to maintain its secrecy. The Board Representative will interpret and apply the rules governing the election and shall decide on all challenged votes. The Board Representative's decisions shall be final as to the immediate conduct of the election, but appeal may be made to the National Mediation Board, provided that timely notice of such appeal is given in writing to the Board Representative. Each organization that is a party to this dispute may, if it so desires, appoint an observer. Such observers shall be under the supervision and direction of the Board Representative at all times.

ELECTION RESULTS

The Board Representative will count and tabulate all ballots at a time and place designated by the Board Representative. A report giving the results of the election will be made by the Board Representative on a form prescribed by the National Mediation Board and copy of this report will be furnished to the parties to the dispute and the carrier involved.

CERTIFICATION

Certification of the name or names of the organization or individual that has been designated and authorized to represent the employees involved in this dispute will be made by the National Mediation Board to the parties to the dispute and the same will also be certified to the carrier.

DISPOSITION OF BALLOTS

The original ballots and tabulation sheets together with the report of the results of the

election by the Board Representative will be filed with the National Mediation Board, Washington, D. C. 20572, for reference and safekeeping.

By order of the NATIONAL MEDIATION BOARD.

[APPENDIX NO. 3]

UNITED STATES OF AMERICA
NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

INSTRUCTIONS TO ELIGIBLE EMPLOYEES VOTING BY U.S. MAIL

THE CONTENTS OF THE NOTICE OF ELECTION; THE OFFICIAL BALLOT; AND THE INSTRUCTIONS TO ELIGIBLE EMPLOYEES VOTING BY U.S. MAIL CONSTITUTE THE ONLY OFFICIAL RULES GOVERNING THIS ELECTION. NO ONE IS AUTHORIZED TO PROMULGATE ANY RULE OR PROCEDURE CONTRARY TO THOSE REFERRED TO HEREIN.

An Official Ballot and a return-addressed mailing envelope (no postage required) are enclosed herewith. To vote by mail, carry out the following instructions:

Mark an "X" in the square of your choice, fold and place the ballot in the mailing envelope. After sealing the mailing envelope, *PRINT* your name on the first line under the attest on the back of the envelope, and *SIGN* your name on the second line. Deposit this envelope, which requires no postage, in the U.S. Mail so as to reach the designated location for the count prior to the time and date indicated.

After the mailing envelope has been checked against the eligibility list, your folded ballot will be removed from the envelope and thoroughly mixed with other ballots before being unfolded and counted by the Board Representative, thus insuring complete secrecy.

YOUR BALLOT CANNOT BE COUNTED UNLESS YOU COMPLETE THE ATTEST ON THE BACK OF THE MAILING ENVELOPE.

Form NMB-R-2 (b)

APPENDIX NO. 5
(Three Organizations)

UNITED STATES OF AMERICA
OFFICIAL BALLOT OF NATIONAL MEDIATION BOARD

Involving CASE NO. (Case)

(Craft or Class)

Employees of

(Name of Carrier)

(Dates of Election Period)

A dispute exists among the above named craft or class of employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of the Railway Labor Act. The National Mediation Board is taking a SECRET BALLOT in order to ascertain and to certify the name or names of organizations or individuals designated and authorized for purposes of the Railway Labor Act.

INSTRUCTIONS FOR VOTING

No employee is required to vote. If less than a majority of the employees cast valid ballots, no representative will be certified. Should a majority vote to be represented, the representative which receives a majority of the votes cast will be certified.

If you desire to be represented by:

(Name of Contesting Labor Organization)

Mark an "X" in this square ..... ☐

If you desire to be represented by:

(Name of Contesting Labor Organization)
Mark an "X" in this square ..... ☐

If you desire to be represented by:

(Name of Contesting Labor Organization)
Mark an "X" in this square ..... ☐

If you desire to be represented by:
ANY OTHER ORGANIZATION OR INDIVIDUAL
Write name of such organization or individual on the line below:

_____, AND
Mark an "X" in this square ..... ☐

NOTICE

1. This is a SECRET BALLOT. DO NOT SIGN YOUR NAME.
2. Marks in more than one square make ballot void.
3. Do not cut, mutilate or otherwise spoil this ballot. If you should accidentally do so, you may return the spoiled ballot at once to the Mediator and obtain a new one.

WILMA B. LIEBMAN

[Letterhead]

April 28, 1986

Mr. Rowland K. Quinn
Executive Director
National Mediation Board
1425 K Street, N.W.
Washington, D.C. 20570

Re: *Trans World Airlines, Inc.*
NMB Case No R-5610

Dear Mr. Quinn:

This letter will serve as an appeal to the Board on behalf of the International Brotherhood of Teamsters, Airline Division, of certain eligibility rulings made by Mediator Joseph Anderson on April 25, 1986, in the above case.

I. The Mediator has ruled that individuals included on the list of potential eligible voters who are now working as strike replacements for TWA flight attendants are eligible voters in this representation election. The IBT appeals from that ruling.[1]

On April 2, 1986, the Board ordered the carrier to furnish a list of all employees presently on the eligibility list and working in another craft or class. In a letter dated April 8, TWA confirmed that passenger service employees were presently working as flight attendants. On April 18, the Board again ordered TWA to furnish the requested information to Board representative Anderson on April 25.

On April 25, the IBT protested the eligibility of all passenger service employees presently working as replacements for striking IFFA flight attendants. The carrier opposed this and refused to reveal the names or number of individuals in this category. The IBT has reason to believe the number may be as high as 500. See article attached hereto as Exhibit 1.

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1 The IBT concurs in his ruling that employees permanently assigned as flight attendants are ineligible.

As stated, the Mediator ruled these individuals eligible. His ruling is clearly contrary to established Board precedent. In the 1981 TWA election, the Board ruled that "employees working in other crafts or classes either on the cut-off date or at the present time are ineligible." *TWA*, 8 NMB 663, (1981). This was so even if they retained recall rights to their original positions. Also, in that case, the Board ruled ineligible reservations sales agents *temporarily* assigned to special duties as Travel Agency Automation Coordinators—a non craft or class position.

In *American Airlines*, 6 NMB 45, (1976) the Board stated as follows:

> It is established National Mediation Board policy that only those employees with a present interest regarding the craft or class in dispute are eligible to vote in an NMB representation Election."

And, earlier in *Chicago & North Western Railway Company*, 4 NMB 240, 249 (1965), the Board stated:

> In representation disputes the Act deals with the present status and the present interests of the employees involved and not with potential future status and potential future interests of the employee. The Board has long adhered to the established and recognized practice to vote employees in the one craft in which they are employed at the time of the election.

The above-quoted language was relied on by the Board in *Airborne Express*, 9 NMB 54 (1981) in ruling ineligible an employee in a situation comparable to that of these "contingent flight attendants." The IBT there sought to represent pilots. It challenged the eligibility of a pilot who, pursuant to an agreement with the carrier, was presently performing the duties of an instructor but would return to full-time duties as a line pilot at a later date. He was ruled ineligible notwithstanding that his status as an instructor was, according to the carrier, only temporary. The determinative factor was that he was presently working as a flight instructor out of the craft of class.

In *United Airlines, Inc.*, 11 NMB 41 (1983), the Board upheld the eligibility to vote of ten persons temporarily assigned to the craft or class in question—ground instructors. The IBT had argued that since they were to be recalled as line pilots they should not vote as instructors. The carrier argued that the "controlling factor should be the present status and present interest of the employees." Further, it pointed out that the assumption that these employees would be recalled as line pilot was speculative, since the employees had no recall dates to flight status. The Board repeated the *Chicago and North Western* language cited above and held that the ten pilots were presently working in the craft or class of Ground Instructors and therefore had a present interest in that craft or class.

The above discussion makes clear that passenger service employees presently working out of the craft as flight attendants are not eligible to vote. Their present status is the controlling factor. These employees are flying as strike replacements. They have received special training for this employment. The notion that they shift back and forth from day to day between crafts is preposterous. There is no certainty that they will return to passenger service duties. It is unknown when or if the IFFA strike will be settled or when or if striking flight attendants will return to work. No written assurance has been communicated to the replacements coming from passenger service jobs that they will return to passenger service work on a date certain in the near future.[2] As in *United*, no recall date to passenger service status have been guaranteed. For all these reasons, their recall is speculative.

The carrier argues that these employees are temporarily assigned, as opposed to 24 others who have permanently transferred to flight attendant positions. This distinction is not dispositive. All of these employees have moved to flight attendant work on a strictly voluntary basis. This fact alone negates their present interest in the passenger service craft. There is a reasonable likelihood that more of them will become permanent. All they need do to become permanent is make applica-

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2 Even with a written agreement governing his return to pilot duties in the near future, the instructor in *Airborne Express* was ruled ineligible to vote as a pilot.

tion; certainly the carrier will not refuse their applications. At this time it is impossible to know how many of these employees intend to return to the craft or class. If there is no settlement between IFFA and TWA, in all likelihood, these employees will continue on as flight attendants. And, no IFFA settlement is presently expected. In sum, these employees should be excluded from the eligibility list regardless of their alleged "temporary" assignment. Their expectation of recall is speculative, and Board precedent dictates their exclusion since their present status is determinative.

II. Should the Board deny our eligibility appeal regarding "contingent flight attendants," the IBT then renews its request for a two week extention of the voting period. As stated, we have reason to believe that up to 500 passenger service employees may be working as flight attendants. Given the unique pressures of the strike situation, these employees have been away from home for a substantial portion of the voting period. An extension is warranted in order to give the organizations an opportunity to communicate with these individuals and to give them an opportunity to vote. This request is buttressed by the carrier's undocumented assertion that, beginning May 10, these employees will start to return to their original positions.

To reiterate, it is the position of the IBT that these individuals should be removed from the eligibility list since they are not presently working in the craft of class and have no present interest in it. Should the Board deny this appeal, however, then, and only then, does the IBT seek a two week voting extension.

III. The IBT also sought the removal from the list of all SATO agents. (List attached as exhibit 2.) A separate corporation named SATO, Inc. has been formed which is to become the employer of the 1200 airline employees now staffing SATO locations, including TWA's. We understand that this change in employment status will take place on May 1, 1986. (See documentation attached as exhibit 3.) While May 1 is just past the date of the ballot count, it is clear that the SATO agents have no expectation of continued employment with TWA in the passenger service craft or class and thus should not be eligible to vote. See NMB representation Manual, §§ 5.302, 5.309.

Should the Board uphold the Mediator's determination that SATO agents are "presently" employed in the craft or class and thus are eligible, then, *a fortiori*, it must rule all passenger service employees presently working as flight attendants to be ineligible as presently outside the craft. If the controlling factor is present status, then both groups can not be eligible consistently. We maintain, however, that both groups properly can be ruled ineligible. Since SATO agents are definitely to be separated from employment status with TWA very shortly, they have no real present interest in the craft and no expectation of continued employment. Similarly, the contingent flight attendants, with no assurance of reemployment as passenger service agents, also lack a present interest in the craft.

IV. The IBT sought to have removed from the eligibility list the names of all employees for whom ballots were returned to the Board as undeliverable and whose addresses were never located despite efforts by the carrier and the parties to do so. The Mediator denied this challenge claiming that he had remailed returned ballots two or three times hoping that they ultimately would be forwarded. The IBT strenuously appeals from his ruling. It is clearly contrary to established precedent.

It is patently obvious that the names of all individuals for whom ballots were returned and for whom addresses were never located should be removed from the list since they had no opportunity to vote. This, in fact, was done during the 1981 TWA election. See also *Continental Airlines*, 11 NMB 46, 47 (1984) wherein the Board stated: "[t]he name of any employee whose ballot is returned as undeliverable by the Postal Service will be removed from the list of eligible voters unless the Board is able to locate the employee and provide a ballot at least two weeks prior to the count date."

The carrier's assertion that employees have a duty to inform their employer of current addresses and, therefore, should remain on the list needs no response. It is specious. It is entirely possible that these individuals are no longer employed by TWA and have moved. In any event, even if they are still employed they have been deprived of the right to vote. Leaving them on the list imputes a "no" vote to them without reason. Finally,

even if the ballots were remailed to the same address by the Mediator and have not yet been returned to the Board, the names should be removed from the list. In all likelihood the ballot was never delivered. If the employee has cast a ballot, only then should his/her name remain on the list. That person obviously had an opportunity to vote, whereas the others did not.

V. The IBT appeals the Mediator's ruling that employees on medical leave for more than two years are eligible. (See list of names attached as exhibit 4.) TWA asserts that employees are entitled to medical leaves of absence, without severing their employment status, for up to five years. This assertion is ridiculous. Five years is an excessive period for the Board to take seriously. Employees on leave for more than two years have no reasonable expectation of return to work in the craft or class, and clearly they have no present interest in the craft of class. Our experience indicates that none of these employees would be likely to cast a ballot—precisely because they lack a present interest.

While TWA maintains that they have a continuing employment relationship, that bare assertion is meaningless without the proper substantiation. To sustain the representation, TWA would have to show that employees out on leave for more than two years are still accumulating seniority and pension credits. Also highly critical is whether TWA is making health and welfare benefit payments on their behalf, or whether the employee is receiving physical disability payments. See NMB Representation Manual § 5.311. We doubt seriously that this is the case. Without supporting facts, the mere self-serving representation that they still have an employment relationship should not control. Further, the Representation Manual § 5.036 provides that "[w]here the question of leave of absence is contested, the Board representative should require supporting documents to verify that a bona fide leave of absence is in effect." Unless TWA furnishes such evidence both of bona fide leave and of continued employer-employee relationship, employees on medical leave for more than two years should be ruled ineligible. Certainly, those on leave for more than three years should be

removed from the list. Five years is simply an unreasonably long period to be countenanced for eligibility purposes.

This argument also holds true for the one individual, Brenda Glick, who has been on personal leave since 7/27/83. She too should be ruled ineligible.

VI. There was some confusion at the April 25, 1986, conference as to the Mediator's rulings on furloughed employees. The IBT believes that there may have been some inconsistency in his rulings. Most of the individuals at issue, we believe, were ruled ineligible, subject to appeal by TWA. However, for the record the IBT wishes to state its position.

All employees furloughed for more than two years should be ruled ineligible. These employees have no reasonable expectation of returning to work after layoff for more than two years. This is particularly true for many of them have been laid off from stations which no longer exist or positions that no longer exist.

TWA's self-serving representation that they retain recall rights is not dispositive. Their recall right is surely illusory when new employees have been hired into the craft or class while others remained on furlough. The issue is not whether they have the right to recall. The issue is whether the right is honored. When new employees are hired while others remain on layoff, then the right is not honored. In this situation, the laid off employees are ineligible. The fact that a handful of very recently furloughed employees may have been recalled, as TWA asserts, is irrelevant. No employees furloughed in excess of two years have been so treated. Again, as with medical leaves, certainly those on furlough for more than three years should be ineligible.

VII. Finally, the IBT appeals the eligibility ruling as to Earl Trout III, #090119. Mr. Trout is classified as a reservations sales agent on the list. However, for several years he worked out of the craft as a computer programmer, a clerical position, at the Philadelphia Tour Center. He held this position as of and after the cutoff date. While he subsequently has returned as a reservations agent, he should be ruled ineligible. "Employees working in other crafts or classes either *on the cut-off date* or at

the present time are ineligible." *TWA*, 8 NMB at 668. See also *Jet America*, 10 NMB 275, 284 (individual working in another craft on eligibility cutoff date ineligible).

Thank you for your consideration to this appeal.

Very truly yours,

WILMA B. LIEBMAN

Wilma B. Liebman
Attorney, IBT Airline Division

WLB:lu
Enclosures
cc: William F. Genoese
William Scheri
V.L. Frankovich
John T. Weise, Esq.
Kathleen M. McKenna, Esq.

UNITED STATES OF AMERICA
APPEAL BEFORE
THE NATIONAL MEDIATION BOARD

Case No. R-5610

In the Matter of the Application of

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Applicant,

INTERNATIONAL BROTHERHOOD OF TEAMSTERS CHAUFFEURS AND WAREHOUSEMEN OF AMERICA,

Intervenor,

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Intervenor,

alleging representation dispute pursuant to Section 2, Ninth, of the Railway Labor Act

involving Passenger Service Employees of

TRANS WORLD AIRLINES, INC.,

Carrier.

CARRIER MEMORANDUM SUPPORTING ELIGIBILITY DECISIONS OF THE MEDIATOR AND APPEALING AN ORDER OF THE EXECUTIVE DIRECTOR

INTRODUCTION

On April 25 and 28, 1986, at the request of the Carrier, the parties in the above-captioned matter and the Carrier met with Mediator Joseph E. Anderson for purposes of resolving challenges to the eligibility of certain individuals to participate in the Passenger Service craft or class election. On those dates Mediator Anderson advised all present that they would be provided an opportunity to raise on appeal those Mediator decisions with which they had disagreement. On April 28, 1986 it

was agreed that all appeals would be submitted by May 2, 1986. Later on April 28, 1986 the Board announced the impounding of all ballots pending resolution of the May 2 appeals.

On April 30, 1986, the Carrier received a telegram under signature of Rowland K. Quinn, ordering the Carrier to furnish on May 2 "the names of all employees on the eligibility list who were temporarily working outside the craft or class of passenger service employees on April 28, 1986." This Memorandum is submitted in support of the Mediator's decisions concerning eligibility and as an appeal to the Board from the directive of Mr. Quinn to produce a list of temporary flight attendants.[1]

GENERAL STATEMENT OF CARRIER POSITION

The decisions of the Mediator concern issues of employment status (*i.e.*, temporary employment, leaves, etc.). The Carrier supports the Mediator's decision denying the union attempt to disenfranchise eligible voters. His decisions are entirely consistent with the Act and Board policy. The Mediator was mindful of and applied the Board mandate that:

> In representation disputes the Act deals with the *present* status and *present* interests of the employees involved and not with potential future status and potential future interests of the employee.

Chicago & North Western Ky. Co., 4 NMB Determ. 240, 249 (1965). With respect to each of the five employment status issues discussed *infra*, the Mediator correctly found the employees within those groups to have a present interest in the Passenger Service craft or class rendering them eligible to vote. This is exactly the same reasoning that the Board applied in instant case in the Carrier's Ozark Airline appeal, 13 NMB Determ. 146,147 (1986).

Related to the Mediator's decision concerning the continued eligibility of certain Passenger Service employees serving as

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1 Today the Carrier received a decision of the Board in the above-captioned matter 13 NMB Determ. 196 (April 28, 1986) denying the Carrier's appeals relating to job classifications properly includable in the craft or class. The Carrier does not reassert those arguments here.

Contingent Flight Attendants, is Mr. Quinn's directive that TWA nevertheless identify those contingent employees. The Carrier has previously submitted evidence and herewith submits additional evidence which without question permits the Board to resolve the eligibility of these employees without identifying them by name. TWA is reluctant to provide such identification because, as demonstrated by the evidence submitted herewith, the contingents have been the victims of a constant and intensifying campaign of physical abuse, verbal threats and property damage by striking flight attendants and their supporters.[2] *See*, Exhibit A—Physical Abuse; Exhibit B—Property Damage; Exhibit C—Threats and Harassment. Providing a list of Contingent Flight Attendants, if made available to the unions, would compromise the safety of these employees. As discussed below, the Carrier is prepared to submit a list of Passenger Service employees who have served or are serving as Contingents for an *in camera* inspection by the Board should it ultimately determine it is unable to decide the eligibility issue without specific identification of the Contingents. The Board must act to protect not only the employee's right to vote but their physical safety and peace of mind. A rejection of the Union's purely political demand for identification of those who have served as Contingent Flight Attendants is imperative.

I. THE DECISION OF THE MEDIATOR THAT PASSENGER SERVICES EMPLOYEES WORKING AS CONTINGENT FLIGHT ATTENDANTS ARE ELIGIBLE TO VOTE IS CORRECT AND THEREFORE NO INDIVIDUAL IDENTIFICATION IS JUSTIFIED

As the Board is well aware, on March 7, 1986 the regular craft or class of flight attendants of TWA, represented by the Independent Federation of Flight Attendants ("IFFA"), struck the Carrier. TWA then began servicing all flights with managerial and non-contract employees on a temporary basis as the carrier processed new hires. The International Brotherhood of Teamsters ("IBT" or "Teamsters") has challenged the right of

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2 The leadership of IBT has announced its support for IFFA's strike. See Exhibit D.

Passenger Service employees temporarily serving as flight attendants to participate in this election. By blatantly ignoring the facts presented by the Carrier[3] and grossly distorting the case law the IBT asserts that craft and class employees who will have worked as contingent flight attendants, for at most a two month period, have abandoned all interest in the outcome of this election.

An accurate statement of the facts and the law exposes the preposterous nature of the IBT claim. Contrary to the IBT assertions, the absolutely incontrovertible facts, Affidavit of William Borden, Exhibit E, are as follows:

1. *All* TWA employees serving as a contingent flight attendants will be returned to their regular jobs shortly. As of April 30, 1986 the majority of contingent flight attendants were released. As of today, May 2, all contingent flight attendants serving the domiciles of Los Angeles, San Francisco, St. Louis, Chicago and Boston have been returned to their regular positions. Of the original complement of 1200 contingents there are approximately five hundred (500) remaining. Of the original 339 contingents who are passenger services employees less than one-half that number remain as contingents. The remaining contingents are being released on an accelerated basis as trainees are being placed in permanent positions.
2. This was two days sooner than the Carrier anticipated when on April 28 it announced that the need for permanent flight attendants was satisfied.
3. *Every* TWA employee undertaking a flight attendant job during the strike emergency was advised that this assignment was temporary only. *Every* such employee was assured of return to his or her regular work assignments.
4. Consistent with the temporary nature of the assignment *no* contingent flight attendant had any change of job

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3 It is crucial to note that the IBT has not submitted a shred of evidence in support of their challenges to the temporary nature of the contingent flight attendant assignments.

status entered in his personnel file. Job titles and grade assignments were not changed.

5. Some contingent flight attendants performed both their regular passenger service jobs as well as serving as flight attendants.
6. Since the commencement of the strike contingent flight attendants have been returned to their regular passenger services jobs at their request or as their services were no longer needed.
7. The number of passenger service employees assigned to contingent flight attendant work changed daily as these employees returned to their original assignments.
8. Contingent flight attendants are eligible for *permanent* flight attendant positions *only* upon application. Candidates are required to successfully interview for the position and must pass formal flight training. Twenty-six (26) passenger service employees received permanent flight attendant positions. Contrary to the IBT assertions, there are passenger service employees who applied for but were refused permanent positions. Copies of correspondence submitted by disappointed agents are submitted for Board review as Exhibit F.
9. The one factor that none of the unions has denied or can deny is that contingent flight attendants have been subject to a pattern of harassment and violence jeopardizing their safety and peace of mind. Across the country since March 7 and without cessation, contingent flight attendants have been subjected to verbal abuse, threats, intimidation, physical abuse and property damage.

In contrast, the IBT and IFFA have presented no evidence justifying their repeated demands for the identification by name of the contingent flight attendants. The names of the employees add nothing to a determination of whether the contingents should be disenfranchised because it is absolutely clear that none has been "regularly assigned" to work outside the class within the meaning of § 3.503 of the Manual. These Passenger

Service employees have a present interest in the election which they have not abandoned by pitching in to keep the Carrier flying. They regularly worked in the craft or class at the time the petition was filed, some continue to work in the craft or class while accepting flight assignments and all but the twenty-six who have been permanently transferred have already returned or will return in a matter of days to the craft or class.

The IBT's representation of law is no more accurate than its representation of the facts concerning the contingent flight attendant issue. The Teamsters cite *American Airlines, Inc.*, 6 NMB Determ. 45 (1976) and *Airborne Express Inc.*, 9 NMB Determ. 54 (1981); *United Airlines, Inc.*, 11 NMB Determ. 41 (1983) and the prior TWA decision, 8 NMB Determ. 663 (1981) as dispositive. None of these cases involve a situation where regular members of the craft or class were disenfranchised due to a brief reassignment of duties in the face of a strike.

American Airlines stands for the completely irrelevant proposition that *temporary* employees *in the craft or class* are ineligible to vote. In this case the issue is regular craft and class employees temporarily assigned *outside* of the craft or class. The citation of *Airborne Express, Inc.* is equally unsupportive. In that case, a pilot was working outside of the craft or class as an instructor, having agreed to work for a *two-year period* in such dual capacity where the preponderance of his responsibilities were outside the craft or class. Because at the time of the election, the pilot still had over one year to serve as an instructor he was deemed to have no present interest in a pilot election. In the instant situation all of the Passenger Service contingent flight attendants at the time of the filing of the petitions were regularly working in the craft or class. They were fully advised that their assignment would be temporary in nature. In fact, at worst some contingents will have served for a two and one-half month period.

Every contingent flight attendant who has not been permanently transferred will be returning to his or her regular position. Those facts make this dispute different from the one found in *United Airlines, Inc.* In that case, pilots temporarily assigned to the craft or class of ground instructors only had recall rights for an unspecified date in the future to the pilot craft

or class. That case was similar to the prior *Trans World Airlines, Inc.* decision in which the Board determined that former passenger service employees regularly working outside of the craft or class (in clerical positions) who merely possessed recall rights to craft or class jobs were ineligible to vote. In this case, the contingent flight attendants *regularly* work in the passenger service craft or class and only for a brief temporary period have been assigned outside of the craft or class. Without question, the passenger service contingent flight attendants cannot be disenfranchised from this election on the basis of a mere two-month stint outside of the craft or class. They plainly have a *present* interest in the outcome of this election.

The evidence demonstrates that it is unnecessary to identify the contingent flight attendants by name in order to resolve the issue of their eligibility to participate in this election. It is instructive in resolving this issue to bear in mind the rationale for the Board's requirement of "present status" and "present interest" of potentially eligibile employees. As the Board noted twenty years ago, "any other practice would mean multiple voting and multiple representation, and would obliterate the lines between the crafts or classes which Section 2, Fourth and Ninth, clearly intend should be maintained." *Chicago & North Western Railway Company*, 4 NMB Determ. 240, 249 (1965). Thus, an alternate way to confirm that these contingent flight attendants have an interest in this craft or class election is to ask whether they would be eligible to vote in a flight attendant election if they were temporarily serving in those positions. It is clear that the Board's manual at Section 5.302 as well as its decision in the prior *TWA* matter, among other similar cases, would render the employees ineligible to vote in such an election. As every employee of a carrier is entitled to participation in some craft or class, it is readily apparent that the Passenger Service employees who have served and are serving as contingent flight attendants have the "present status" and "present interest" to vote in the Passenger Service election.

That the real purpose of the union's request for identification of the contingents is to foster purely political goals is readily apparent. The Teamsters have created the contingent flight attendant issue to "buy" more time. The IBT argues that the

flight schedules of the contingents have possibly impeded its ability to communicate with the employees and with the employee's ability to vote. To the contrary, the petitions were filed in this matter in early January 1986. The unions clearly communicated with a large number of the craft or class prior to that date and that opportunity to campaign was completely unimpeded throughout January and February. Communications with the contingents during the strike were no less available as demonstrated by the violent and harassing contact made with those employees. There is no reason to believe that the contingents have not had the opportunity to vote. Notices of the dates of this election identifying the eligible craft or class were posted by the Carrier systemwide. The IBT itself conducted an extensive campaign advising employees who had not received ballots to request duplicates from the Board. The contingent flight attendants were aware of the election and had ample opportunity to vote.

It should be noted that IFFA's original request for the identification of contingent flight attendants, apparently abandoned by letter of April 28,[4] was also politically motivated. As evidenced by correspondence between the Carrier and IFFA the Union has demanded in connection with the IFFA strike the names and addresses of all contingent flight attendants. Exhibit G. This request has been denied by the Carrier and an action for declaratory judgment has been filed to resolve the identification issue. It would be highly inappropriate for the Board to permit the Union to manufacture an issue which permits it to obtain that to which it is otherwise not lawfully entitled.

The Carrier's reluctance to provide identification of the contingents is well founded. Submitted herewith are reports of physical abuse, verbal harassment and property damage which are several inches thick. The Carrier's concern for the safety of its employees is not based on a few minor random events. See

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4 By letter of April 28, in an about face, IFFA contended that all Passenger Service employees working as flight attendants were eligilble to vote including those *permanently* transferred to flight attendant positions. Unquestionably permanent flight attendants have *no* interest in the outcome of this dispute.

Exhibits A, B and C.[5] Employees have received bodily injury and have been threatened with death. Employees have been threatened with extreme physical violence. They have had their tires slashed and their car brakelines severed. Their homes have been defaced. They receive harassing calls at home. Callers threatened to harm their families. Children are told the parents will be harmed. These incidents are not just annoying strike-related pranks—although redirecting employee's mail and ordering unrequested merchandise and magazines is its own form of nasty harassment. In the face of this campaign of retaliation it would be irresponsible of the Carrier to identify these individuals without some assurances of their safety.

The Board does not need the names of the individual contingent flight attendants in order to resolve whether they are eligible to vote in this election. Nonetheless, if the Board should conclude on appeal that it is unable to ascertain whether the contingent flight attendants are eligible without an identification by name, then the Carrier requests that the Board establish a procedure to safeguard the submission of such names. The Carrier suggests that an appropriate procedure would be an *in camera* inspection by the Board of the names of the Passenger Service employees who have served or are serving as contingent flight attendants. Given the pattern of harassment and violence which has accompanied the flight attendants' strike, it is imperative that the Board assure the Carrier that such list will *not* be provided to any of the labor organizations. The only circumstance under which the Board should reveal these employees' names to the unions is if and when it determines that such individuals are ineligible to vote in this election. At that point, the Board would be obligated to notify the parties of any changes in the eligibility list. Manual, Section 11.901. The Carrier was prepared to submit for an *in camera* inspection such a list on Friday, April 25 and Monday, April 28, but the Mediator's correct disposition of this issue obviated the need for such review. The Carrier reiterates its commitment to permit such *in camera* re-

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5 All Carrier Exhibits submitted herewith have been provided to the Board only. The Carrier requests that these Exhibits not be shown to the Unions.

view upon receipt of the safeguards necessary to protect the health and welfare of the contingent flight attendants.

II. THE MEDIATOR CORRECTLY CONCLUDED THAT SATO EMPLOYEES ARE ELIGIBLE VOTERS

Scheduled airline traffic offices (SATOs) are joint airline ticketing facilities located at various U.S. military installations around the world. At present there are 547 SATO locations in the United States staffed by airline employees and TWA currently has sixty-three (63) employees in SATOs.

The SATO program is being restructured because antitrust immunity will be lifted on or about May 2, 1986. Exhibit H. A corporation by the name of SATO, Inc. has been established as a successor to the current SATOs. Those airline employees presently assigned to SATO positions will *remain* employees of their respective airline with all Carrier personnel benefits remaining in effect. However, *future* personnel hired to staff SATO positions will be hired as employees of SATO, Inc. Exhibits I and J.

Therefore, contrary to the claim of the IBT, these SATO employees of TWA have a present status and a present interest in the outcome of this election.

III. THE MEDIATOR CORRECTLY CONCLUDED THAT FURLOUGHED EMPLOYEES ARE ELIGIBLE VOTERS

The Teamsters argue that all employees who have been furloughed for more than two years should be ineligible to vote in this election because the issue is not "whether they have the right to recall [but] whether the right is honored." IBT asserts that the Board applied a two-year cutoff period in the prior TWA election. The Board's reported decision at 8 NMB Determ. 663 does not articulate a two-year cutoff rule. It is unlikely that two-year rule was applied as an employee on furlough for two and one-half years was permitted to vote in that election (R.R. Farrar at 672).

The Carrier extended the length of its furlough from an original two and one-half years to five years on August 15, 1980. Exhibit K. It is the Carrier's own rule that determines employment

rights unless strong evidence is presented to impeach the rule. Furloughed employess recall rights are not limited to the stations from which they are furloughed but rather they possess systemwide recall rights. Exhibit L. The Teamsters and IFFA argue that the fact that less senior employees are working in stations from which furloughed employees were laid off demonstrates that there is no expectation of return.

The facts undercut the Unions' assertions. First, as the Carrier proved on April 25 and April 28, the instances of alleged employment of junior employees were all examples of part-time employees. Pursuant to Carrier policy, furloughed employees may refuse recall to part-time positions and retain full-time recall rights. Second, and most importantly, employees who have been furloughed for periods in excess of two years are offered and do accept recall. Since the filing of the petitions in this matter, five (5) furloughed employees have been recalled to service. Three (3) of those employees were on furlough for *more* than two years and if the Unions' argument were applied three of the five employees would be disenfranchised.[6]

The Board's policy articulated in the Manual at Section 5.305 is that furloughed employees are eligible if they "retain an employer/employee relationship and have a reasonable expectation of returning to work." Without question, the employer/employee relationship exists between TWA and its furloughed employees. These employees are granted certain rights by the Carrier Non-contract Personnel Policy Manual. Additionally, there is a reasonable expectation that these employees will return as evidenced by the fact that employees, even those on furlough approaching five years, have been returned to full time employment. If a union is certified to represent the passenger service employees at TWA, furlough and recall rights will inevitably be a subject of negotiation. It would be improper to disen-

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Employee Number	*Employee Name*	*Furlough Date*	*Recall Date*
37442	Mancuso, Michael M.	9/18/83	1/20/86
55909	Marzell, Elizabeth B.	12/20/83	1/27/86
92865	McFarland, John R.	6/7/81	4/7/86
75202	Perez, Rozell	11/13/85	1/20/86
37982	Warren, Barbara S.	10/16/85	2/24/86

franchise TWA's furloughed employees who clearly possess a present interest in the outcome of this election.

IV. THE MEDIATOR CORRECTLY CONCLUDED THAT EMPLOYEES ON MEDICAL LEAVE ARE ELIGIBLE VOTERS

For the same reason that furloughed employees should be deemed eligible to vote, employees on medical leave are also eligible. As with furlough, the Carrier has a five-year return policy for employees on medical leave. Unlike furloughed employees, however, the Carrier maintains periodic contact with medical leave employees. As a general rule employees must apply every ninety days for a renewal of their medical leave. While on leave these employees continue to accrue seniority and receive health insurance and disability payments. Exhibit M. As to the particular employees challenged by the Teamsters, the Carrier on April 25 and April 28 supplied evidence of the bona fides of the leave of all employees claiming medical absence. That being the case, pursuant to Manual Section 5.306, these employees are on "authorized sick leave" and thus are eligible to vote in this election.

V. THE MEDIATOR CORRECTLY CONCLUDED THAT EMPLOYEES FAILING TO PROVIDE CURRENT ADDRESSES ARE ELIGIBLE VOTERS

The Teamsters contend that those ballots returned to the Board as undeliverable should cause the Board to conclude that the eligible employees have had no opportunity to vote and thus their names should be stricken from the list. The Teamsters infer from the returned ballots the possibility that the individuals are no longer employed by TWA. Further, the Union contends that "leaving them on the list imputes a 'no' vote to them without reason."

The circumstances of the instant dispute prohibit the Board from striking these people from the list of eligible voters. It is Carrier policy that every employee has the obligation to advise the Carrier of any change in address. Exhibit N. The Carrier has checked at the request of the Mediator the list of eligible

voters and those individuals no longer employed by the Carrier have in fact been struck from the list. Any ballots which have been returned as undeliverable are clearly incapable of delivery due to the employee's own fault. These employees had *every opportunity* to vote in this election. Notices of the impending election were posted throughout the system in prominent locations. Each labor organization and the Carrier contacted potential eligible voters advising them of the impending election and of their respective campaign positions. As noted before, the Teamsters conducted a wide-scale campaign to encourage those who did not receive ballots but who wish them to apply for duplicate ballots from the Board. Because these employees are presently employed within the craft or class and have been advised of their right to obtain a ballot and vote in this election, it can only be concluded that they have chosen not to vote in this election. Striking their name from the eligibility list disregards their clear intent in this matter.

CONCLUSION

Mediator Anderson correctly ruled that the passenger service employees serving as contingent flight attendants or SATO Agents, those on furlough and medical leave, or who are otherwise unreachable are properly included in the craft or class. The Carrier respectfully submits that his rulings must be sustained.

Respectfully submitted,

TRANS WORLD AIRLINES, INC.

By: /s/ JOHN T. WEISE
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By: /s/ KATHLEEN M. MCKENNA
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Dated: May 2, 1986

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS

[Letterhead]

April 30, 1986

CO-3 Trans World Airlines, Inc.

Subject: Trans World Airlines, Inc.
Representation Dispute
(NMB Case No. R-5610)

Mr. Rowland K. Quinn
Executive Director
National Mediation Board
1425 K Street, N.W.
Washington, D.C. 20570

Dear Mr. Quinn:

This letter is in response to the appeal of the International Brotherhood of Teamsters regarding certain eligibility rulings made by Mediator Joseph Anderson on April 25, 1986, in the above captioned proceeding.

The Mediator has ruled that those persons in the Passenger Services craft and class who are temporarily assigned as "contingent flight attendants" should have their votes counted in this representation election. The IAM agrees. The critical distinction which must be made is whether the assignment is temporary or permanent in nature. The Carrier has conceded that a number of individuals assigned Flight Attendant duties have become permanent Flight Attendants. Those individuals are clearly ineligible. In addition, the Carrier revealed that John W. Bush has been accepted as a permanent Flight Attendant effective May 6, 1986 and therefore no longer has an employment relationship with the Passenger Service craft and class at issue in these proceedings. Accordingly, the IAM appeals the Mediator's ruling that Mr. Bush is eligible despite the fact that he has become a permanent Flight Attendant. However, as to those

who are temporarily assigned Flight Attendant duties, we contend they are fully eligible to vote because their present interest is in the Passenger Services craft and class. See *American Airlines*, 6 NMB 45, (1976). Moreover, the National Mediation Board's Manual suggests the exclusion of only those employees who are working regularly in another craft or class. (Section 5.303) Thus, the distinction to be made is between a temporary assignment and one that is permanently outside of the craft or class. Here the Carrier has represented that aside from those offered permanent positions, all of the contingent Flight Attendants who have been temporarily assigned outside the craft or class will be recalled to their normal positions within a matter of days. Accordingly, the IAM strenuously maintains that the votes of those individuals should be counted.

The IBT argues in the alternative that if the Board upholds Mediator Anderson's decision that the votes of "contingent Flight Attendants" are to be counted then the voting period should be extended for two weeks. The IAM fails to see any rational nexus between the NMB's ruling on these temporarily assigned employees and the IBT's request for further delay. The IAM strenuously urges this Board to proceed expeditiously with the vote count and to reject any further efforts by the IBT to prolong this already protracted procedure. Simply stated, the campaign is over and it is now time to count the ballots.

It should also be noted that the IAM was advised on April 28, 1986 that the election count scheduled for that day would be postponed. However, Mediator Anderson advised that no further ballots would be accepted after 2:00 PM on that date and the impounded ballots received prior to 2:00 PM on April 28, 1986 were sealed. The only limited extension of the voting period would be for those so-called impounded ballots which were sent out on April 22, 1986, of which twelve have been determined to be eligible to vote and for some 39 individuals who have recently been determined to be eligible to vote but who have not received ballots. It is understood that no other ballots will be counted.

The IBT would also have those Scheduled Airlines Traffic Office (SATO) employees declared ineligible. The IBT argues that a separate corporation named SATO, Inc. will come into existence and will employ numerous of the present TWA employees. However, the Board previously ruled in 1981 that SATO agents are indeed part of the craft or class involved in these proceedings. Accordingly, they are fully entitled to participate in the election until such time as their employment relationship changes.

Another issue which has been raised involves a number of ballots which were returned to the National Mediation Board as undeliverable. Despite efforts by the Carrier and the parties, proper addresses for such persons have not been discovered. It is clear beyond doubt that all individuals whose ballots were returned as undeliverable and whose addresses have not been discovered should be stricken from the list of eligible voters. Basic notions of fairness require that rather than being counted as a pro-company or no-union vote which sould be the practical effect of continuing to treat those employees as eligible voters, they should not be counted for any purpose whatsoever. This is consistent with the Board's position during the 1981 TWA proceedings. See *Continental Airlines*, 11 NMB 46, 47 (1984).

The Mediator has also ruled that those employees on furlough or medical leave for less than five years are eligible to vote. The Carrier maintains that such persons continue to have an employment relationship with the Carrier and continue to hold employment rights on a system wide basis for a period of five years. Accordingly, upon reflection, the IAM is of the view that such persons should not be disenfranchised and their votes should be counted. This is consistent with Section 5.305 of the Board's own manual.

The issue of the eligibility of Earl Trout, III, Employee Number 090119 was resolved by the parties before the Mediator on April 28, 1986. Mr. Trout appeared in person to advise that he had been and is currently employed in the Passenger Service craft and class. It is our understanding that the IBT has withdrawn its appeal from the Mediator's ruling. Thus, Mr. Trout should have his vote counted in this election.

The Carrier has sought to exclude certain persons in the Accounting or Automation Department. It is clear that these persons were determined to be part of the craft or class by the National Mediation Board in 1981. These persons continue to have customer contact and are clearly part of the craft and class and should not be excluded. The National Mediation Board has taken the position that once a craft or class determination has been made and an election has been authorized, it is inappropriate for it to reconsider its craft or class determination during the pendancy of an election. *Continental Airlines, Inc.* 11 NMB 131 (1984).

Sincerely,

WILLIAM W. WINPISINGER
William W. Winpisinger
International President

WWW:EAW
C: Peterpaul
Scheri
Celona
Bay
O'Driscoll
Guerrieri
Genoese
Liebman
Frankovich
Weise

UNITED STATES OF AMERICA
BEFORE
THE NATIONAL MEDIATION BOARD

Case No. R-5610

In the Matter of the Application of

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACEWORKERS, AFL-CIO,

Applicant,

INTERNATIONAL BROTHERHOOD OF TEAMSTERS CHAUFFEURS AND WAREHOUSEMEN OF AMERICA,

Intervenor,

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Intervenor,

alleging representation dispute pursuant to Section 2, Ninth, of the Railway Labor Act

involving Passenger Service Employees of

TRANS WORLD AIRLINES, INC.

Carrier.

CARRIER'S MOTION FOR RECONSIDERATION OF NMB ELIGIBILITY ORDER AND CARRIER'S MOTION FOR RELATED RELIEF

TRANS WORLD AIRLINES, INC.

SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
55 East Monroe Street
Suite 4200
Chicago, Illinois 60603
(312) 346-8000

Dated: May 14, 1986

UNITED STATES OF AMERICA
BEFORE
THE NATIONAL MEDIATION BOARD
Case No. R-5610

In the Matter of the Application of

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACEWORKERS, AFL-CIO,

Applicant,

INTERNATIONAL BROTHERHOOD OF TEAMSTERS CHAUFFEURS AND WAREHOUSEMEN OF AMERICA,

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TRANS WORLD AIRLINES, INC.

Carrier.

CARRIER'S MOTION FOR RECONSIDERATION OF NMB ELIGIBILITY ORDER AND CARRIER'S MOTION FOR RELATED RELIEF

NOW COMES TRANS WORLD AIRLINES, INC. (TWA) by its attorneys, SEYFARTH, SHAW, FAIRWEATHER & GERALDSON and moves the National Mediation Board to:

1. Reconsider and reverse its determination dated May 13, 1986 that "contingent flight attendants" are ineligible to vote;

2. In the alternative, agree to reconsider this eligibility question if, after the vote count, the eligibility of "contin-

gent flight attendants" could be determinative of the election outcome;

3. If contingent flight attendants are declared ineligible, use the actual count date *May 16, 1986* to determine eligibility, not the former count date of April 28, 1986;

4. Impound, preserve, seal and retain the ballots of "contingent flight attendants," should said ballots not be counted on May 16; and

5. In order to protect the personal safety of contingent flight attendants and their families, provide the highest degree of confidentiality which the Board determines possible concerning the names of contingent flight attendants.

1. *Reconsideration and Reversal.* On May 13, 1986 the Board ruled that employees working temporarily as flight attendants on April 28, 1986, referred to as "contingent flight attendants," were ineligible to vote in the passenger service election.

The authority for the Board ruling was the citation to two prior NMB decisions, *Chicago & North Western Railway Company*, 4 NMB 240 (1965) and *Trans World Airways, Inc.*, 8 NMB 663 (1981). An examination of these two NMB cases demonstrates clear Board error because the facts do not fit the law. TWA agrees fully with the *Chicago & North Western Railway Company* holding cited by the Board that "the Act deals with the present status and the present interest of the employees involved" and that employees vote "in the one craft in which they are employed at the time of the election."

The TWA passenger service employees temporarily assigned as "contingent flight attendants" on April 28, 1986 are clearly temporary employees, indeed very temporary. Without a doubt, their "present status" is in the passenger service craft or class. The evidence submitted is clear that on May 13, the date of the NMB order, all or substantially all of the temporary flight attendants had been returned to their passenger service jobs.

The *Chicago & North Western* case involves an entirely different situation. That case involves Road Conductors and

Yardmen where the Board could not tell which craft or class was "regular" because the employees accrued seniority in both jobs and regularly worked in each. The TWA situation is totally different. It is obvious to all that the "regular" work of the temporary flight attendants is as passenger service employees.

The *Trans World Airways* case is also completely different. That decision involved a situation where employees hired after the cutoff date were held ineligible to vote. As the Board pointed out, if it did not adopt a cut-off date, the carrier could "manipulate" the voting list and add or subtract to the eligible group of voters. The decision in the present matter permits the same sort of manipulation. Because the Board erroneously focuses on one precise day (April 28, 1986), a carrier could manipulate voter eligibility merely by transferring employees in or out of the passenger service craft or class temporarily on one day, April 28, 1986.

The Board must consider its own Representation Manual. Section 5.303, *Working In Another Craft Or Class*, provides that "employees who are *regularly* working in another craft or class will be considered ineligible." (emphasis added). Section 5.303 has been construed by the Board to treat Passenger Service employees temporarily working as flight attendants *differently* than furloughed and leave of absence employees. Yet the interest in voting in the NMB election by furloughed and leave of absence employees cannot conceivably be greater than that of employees working temporarily as flight attendants. This disparate treatment of the contingent flight attendants as compared to temporary and furloughed employees and to employees on leave of absence is both arbitrary and irrational, a violation of the NMB's Section 2, Ninth duty to investigate "any dispute [which) shall arise among the carrier's employees as to who are the representatives of such employees," and a violation of the carrier's and of the disenfranchised employees' constitutional rights under the Equal Protection Clause. The provision of Section 2, Ninth empowering the Board to "designate who may participate in the election" (RLA Section 2, 9th, 4th sentence) cannot, since the rule of law surely governs all of the Board's actions, license the Board to discriminate against

the disenfranchised employees in the manner here complained of.

Lastly, the error of the Board decision is seen by its internal inconsistency. The NMB held that employees on sick leave and on furlough, away from work for up *to five years*, were eligible to vote whereas contingent flight attendants were ineligible even though they were temporarily away from passenger service work for but a few weeks.

2. *Determination Of Outcome.* If the Board is not prepared to rule immediately that its order of May 13, 1986 be reversed, TWA requests the Board to review and re-examine this question should the votes of the "contingent flight attendants" be determinative of the outcome. By doing this there will be no disenfranchisment or even perception of disenfranchisment of voters. The Board will then have time to re-examine the question thoroughly, should the votes be determinative of the outcome.

3. *May 16 Count Date.* The Board decision states that "the key date for eligibility purposes is the count date of April 28, 1986" (p. 215). The fact is, however, that the Board's own count date is "11:00 a.m. on May 16, 1986" (p. 219). Therefore, this date, May 16, 1986, must be used to determine whether employees are working as passenger service employees or flight attendants.

4. *Ballot Impounding.* If the ballots of the contingent flight attendants are not to be counted on May 16, there may be questions which subsequently arise over the eligibility of these voters. TWA submits therefore that the proper procedure is that the NMB should not destroy these ballots, but should impound, preserve and seal the ballots of "contingent flight attendants".

5. *Confidentiality of Names.* As submitted previously by the carrier in considerable detail, passenger service employees temporarily working as contingent flight attendants and their families have been subjected to broad scale coercion, threats and harassment. In order to protect the physical well being of the contingent flight attendants and their families, TWA requests the Board to adopt the following procedure or some like proce-

dure. The carrier suggests that at 3:00 p.m. on May 15, 1986 the Board provide each labor organization and the carrier the opportunity to meet with the Board representative to review the names of the contingent flight attendants supplied by TWA, with the understanding and assurance that no names of "contingent flight attendants" will be revealed by anyone after accomplishing the review of the eligibility list in the offices of the National Mediation Board.

Dated this 14th day of May, 1986.

Respectfully submitted

TRANS WORLD AIRLINES, INC.

By: /s/ JOHN T. WEISE
John T. Weise

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& GERALDSON
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(312) 346-8000

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No.

TRANS WORLD AIRLINES, INC. ("TWA"),

Plaintiff,

—v.—

NATIONAL MEDIATION BOARD ("NMB"), an agency of the UNITED STATES OF AMERICA,

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO ("IAM"),

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS AND WAREHOUSEMEN OF AMERICA ("IBT")

and

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS ("IFFA"),

Defendants.

VERIFIED COMPLAINT

Plaintiff, TRANS WORLD AIRLINES, INC. ("TWA"), by its attorneys, SEYFARTH, SHAW, FAIRWEATHER & GERALDSON, and BOYAR, NORTON & BLAIR, as and for its complaint against the defendants, alleges as follows:

AS AND FOR A FIRST CAUSE OF ACTION

1. *Introduction.* On May 23, 1986, after a three-union mail-ballot election in NMB Case No. R-5610, the NMB certified the IAM as the representative of TWA's approximately 4,600 "passenger service" employees for purposes of collective bargaining

under the Railway Labor Act ("RLA"). 45 U.S.C. §§ 151-188. Less than 30% of the employees whose ballots were, in the end, counted, voted for the IAM. A 48% plurality of the employees whose ballots were, in the end, counted, in effect voted for no union representation, by not casting valid ballots. Most significantly, the ballots cast by 302 passenger service employees who:

(A) were working temporarily and voluntarily as flight attendants, to assist TWA in operating its airline during a strike by TWA's flight attendant union for a new contract, on the originally scheduled "count date" (April 28, 1986), and

(B) had been released and returned to their regular passenger service jobs, after having temporarily and voluntarily worked no more than 40 days in flight attendant jobs, by the deferred actual "count date" (May 16, 1986),

were not counted. That was because, between those two dates, the NMB reversed a ruling of its own Mediator that such employees were eligible to vote, and ruled that they were not. Upon information and belief, the NMB made this ruling when, and because, it had reason to believe (A) that 50% of the originally eligible employees had not voted, and (B) that, *unless* it reversed the Mediator's ruling, under its election rules requiring dismissal of a representation case when 50% of the eligible voters have not cast valid ballots, *no* union could be certified as a bargaining representative of the passenger service employees. It is TWA's position in this action that the NMB's disenfranchising of the 302 employees (1) changed the outcome of the election, so as to make it possible for the NMB to certify a representative, and (2) violated the Railway Labor Act's requirements pertinent both to the representation dispute among TWA's passenger service employees and to the "major dispute" between TWA and its flight attendant union over a new flight attendant contract, as well as violating TWA's and the passenger service employees' Constitutional rights.

2. *Nature and Purpose of Action.* This action by TWA seeks primarily to set aside defendant NMB's certification of

defendant IAM, and to compel the NMB to retabulate the ballots cast in the mail-ballot election in Case No. R-5610, including as eligible voters "all the employees on the eligibility list who were *temporarily* working outside the craft or class of Passenger Service employees on April 28, 1986" (Order of NMB Executive Director Quinn issued April 30, 1986) (emphasis added) (copy annexed as Exhibit A hereto), namely, the passenger service employees temporarily and voluntarily working as flight attendants on April 28, 1986, whose names the NMB deleted from the voter eligibility list by its ruling of May 13, 1986 (copy of *TWA*, 13 NMB No. 63 annexed as Exhibit B hereto) being complained of in this action. In tabulating the ballots cast in said election in NMB Case No. R-5610, the Board excluded said 302 employees as eligible voters, without investigating or ruling whether they were "temporarily" working as flight attendants, irrationally treating them as employees "working *regularly* in another craft or class" (the flight attendant craft or class, supposedly) within the meaning of its rule for elections providing as follows:

> "5.303 *Working in Another Craft or Class*
>
> "Employees who are working *regularly* in another craft or class on the same carrier will be considered ineligible to participate in the craft or class involved in the Board representative's investigation,"

(NMB Representation Manual, Revised Edition eff. Nov. 1, 1985 [hereinafter "Manual"], Section 5.303) (emphasis added). With said 302 employees treated as ineligible, only 84 employees more than the barest majority of eligible voters cast valid ballots. Retabulating the ballots cast in the election to include any and all ballots cast by said 302 employees may, therefore, change the outcome of the election, since it will create the possibility that a majority of eligible voters have not cast valid ballots. That result will require the NMB not to certify a representative in Case No. R-5610.

3. *Jurisdiction*. This Court has jurisdiction of this civil action under 28 U.S.C. § 1337, 45 U.S.C. §§ 151-188

("RLA"), 28 U.S.C. §§ 1331 and 1346(a)(2), 28 U.S.C. § 1361, 28 U.S.C. §§ 2201 and 2202, and 5 U.S.C. § 702, 704 and 706(1) and (2).

4. *Venue.* Venue in this Court is proper pursuant to 28 U.S.C. § 1391(e).

PARTIES

5. *Plaintiff TWA.* Plaintiff TWA, a Delaware corporation, operates one of the largest airlines in the United States for the transportation of passengers and cargo (freight and mail), serving major destinations in the United States, Europe, the Middle East, India and the Caribbean. TWA employs approximately 29,000 employees including approximately 4,600 employees in the Railway Labor Act craft or class of passenger service employees and approximately 6,000 employees in the Railway Labor Act craft or class of flight attendants. TWA is a common carrier engaged in interstate and foreign commerce within the meaning of Section 201 of the RLA, 45 U.S.C. § 181. TWA and its employees are subject to the provisions of the RLA. TWA maintains offices and facilities and transacts business in this judicial district.

6. *Defendant NMB.* Defendant National Mediation Board ("NMB") is an "independent administrative agency" in the executive branch of the United States Government, created by Section 4, First of the RLA, 45 U.S.C. § 154, First, composed of three members who, at all times pertinent hereto since the commencement of NMB Case No. R-5610, have been William C. Wallace, Chairman, and members Charles L. Woods and Helen M. Witt.

7. *Defendant IAM.* Defendant International Association of Machinists and Aerospace Workers, AFL-CIO ("IAM") is an unincorporated association which exists in part to represent employees within the airline industry with respect to rates of pay, rules and working conditions, and is a labor organization subject to the provisions of the RLA. The IAM regularly engages in and transacts business in this judicial district.

8. *Defendant IBT.* Defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("IBT") is an unincorporated association which exists in part to represent employees within the airline industry with respect to rates of pay, hours and working conditions, and is a labor organization subject to the provisions of the RLA. Upon information and belief, the IBT regularly engages in and transacts business in this judicial district.

9. *Defendant IFFA.* Defendant Independent Federation of Flight Attendants ("IFFA") is an unincorporated association which exists in part to represent employees in the airline industry with respect to rates of pay, rules and working conditions, and is a labor organization subject to the provisions of the RLA.

RELEVANT STATUTORY PROVISIONS AND NMB RULES FOR ELECTIONS

10. *RLA § 2.* RLA Section 2 (45 U.S.C. § 151(a)) states five General Purposes of the RLA, including:

> "(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions . . ."

11. *RLA § 2, Fourth.* RLA Section 2, Fourth (45 U.S.C. § 152, Fourth, second sentence) provides that:

> "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for purposes of this Act."

12. *RLA § 2, Ninth.* RLA Section 2, Ninth (45 U.S.C. § 152, Ninth), which specifies the duty of the NMB to investigate disputes as to who are the representatives of a craft or class of employees designated and authorized in accordance with the requirements of the RLA, provides as follows:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier.
>
> Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter.
>
> In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier.
>
> In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election.
>
> The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

13. *RLA "Major Dispute" Provisions.* RLA Sections 2, Seventh, 5, First, 6 and 10 (45 U.S.C. §§ 152, Seventh, 155, First, 156 and 160) grant carriers and their employees the right to resort to "self-help" for the purpose of forcing the other side to agree to its proposals for changes in agreements affecting rates of pay, rules and working conditions, after exhaustion of all applicable notice, conference, mediation, Emergency Board and "cooling-off" requirements provided in the RLA for resolution of such "major disputes."

14. *Eligibility on "Cut-off Date" and "Count Date".* At all times pertinent hereto, the NMB's rules of election established under RLA Section 2, Ninth have based eligibility of an employee to participate in a representation election, on his or her being within the craft or class in question on two different dates: (1) the "cut-off date" for eligibility, after which date no person hired by the carrier will be eligible to vote, and (2) when, as in this case, the NMB has authorized a mail-ballot election, the "count date."

15. *NMB's Definition of "Temporary Employees".* At all times pertinent hereto, the NMB's rules of election established under RLA Section 2, Ninth have included the following rule (Manual, Sect. 5.302) defining "temporary employees" as employees with "a reasonable expectation of continued employment or reemployment in the craft or class":

> "5.302 *Temporary Employees*
>
> "It is established NMB policy that only those employees with a present interest regarding the craft or class in dispute are eligible to vote in an NMB representation election. Such policy is implemented with respect to temporary employees by examining *whether or not the employees in question have a reasonable expectation of continued employment or reemployment in the craft or class.*" (emphasis added).

16. *Eligibility Of Persons Not Working In Craft or Class.* At all times pertinent hereto, the NMB's rules of elec-

tion established under RLA Section 2, Ninth, have included rules (Manual, Sections 5.503-5.306) for determining the eligibility to participate in an election of persons not working in the craft or class in question on the "cut-off date" or "count date", including the following rules:

"5.303 *Working in Another Craft or Class*

"Employees who are working *regularly* in another craft or class on the same carrier will be considered ineligible to participate in the craft or class involved in the Board representative's investigation. (emphasis added).

"5.304 *Discharged Employees*

"Ordinarily, discharged or terminated employees shall not be considered eligible unless the discharge is being appealed through the applicable grievance procedure or an action for reinstatement has been filed before a court of competent jurisdiction. An individual shall not be considered eligible if the grievance or court action has been finally acted upon and the discharge has been upheld prior to the count of ballots (see NMB Rules, Part 1206.6).

"5.305 *Furloughed Employees*

"Furloughed employees are considered eligible in the craft or class in which they last worked provided they retain an employer-employee relationship and have a reasonable expectation of returning to work.

"5.306 *Leave of Absence*

"An employee on authorized leave of absence, including military leave, from the craft or class in dispute who is neither working in another craft or class, working for the carrier in an official capacity nor working for another carrier, will be considered eligible in the craft or class involved in the investigation. For example, an employee upon au-

thorized leave of absence for labor organization activities will be considered eligible, as well as an employee who is on authorized sick leave."

17. *"Majority of Majority" Requirement for Certification.* At all times pertinent hereto, the NMB's rules of election have required, for certification of a labor organization as a representative, (A) that a majority of eligible voters cast valid ballots in the election, and (B) that a majority of the eligible voters who cast valid ballots vote for representation by the labor organization.

18. *Procedure For "Voting" Against Representation.* At all times pertinent hereto, the NMB's rules of election under RLA Section 2, Ninth have provided for ballots which contain no place for an employee to vote a preference not to be represented by any organization or individual, have required employees desiring to express a preference not to be represented to do so by refraining from filing a valid ballot, and have provided that a representative shall be designated only if a majority of all eligible employees in a craft or class cast valid ballots, and not otherwise.

19. *Procedure for Determining Election Where Plurality of Eligible Voters Does Not Cast Valid Ballots.* At all times pertinent hereto, the NMB's rules of election under RLA Section 2, Ninth have provided for elections with more than one union on the ballot to be determined by the circumstance of whether the unions aggregated received a majority of the valid ballots cast, even where a plurality of eligible voters has not cast valid ballots.

FACTUAL ALLEGATIONS

20. *Union Representation Rejected in Two Prior NMB Elections.* As of the time of the events giving rise to this case, TWA's passenger service employees had no collective bargaining representative. In 1979 and 1981, the NMB had conducted mail-ballot representation elections among TWA's passenger service employees, NMB Cases R-4549 and R-5163, respectively, and the employees had rejected union representation.

21. *Applications For Representation Filed.* On or about January 9, 1986, the IAM filed with the NMB an "Application for Investigation of Representation Dispute." The application alleged the existence of a representation dispute among the craft or class of passenger service employees of TWA and requested the NMB to investigate the dispute and certify the authorized representative of that craft or class pursuant to Section 2, Ninth of the RLA, 45 U.S.C. § 152, Ninth. The NMB designated the application as its Case No. R-5610. On January 9 and January 21, 1986, respectively, the IBT and IFFA filed similar applications and were joined as intervenors.

22. *Cut-Off Date Established.* Under the NMB's rules governing elections, the "cut-off date" for eligibility to vote in the mail-ballot election which the NMB authorized in NMB Case No. R-5610 was established as January 9, 1986 for full-time employees and December 31, 1985 for part-time employees.

23. *List Of Potentially Eligible Voters Furnished.* On February 6, 1986, TWA furnished the NMB, pursuant to the Board's rules, with a list of the potentially eligible voters, *i.e.*, the persons who were members of the passenger service craft or class on the "cut-off date." The list contained the names of approximately 5,010 employees, including persons in the categories reflected by the NMB rules quoted in Paragraph 16 above.

24. *Mail Ballot Election Authorized.* On February 12, 1986, the NMB found a representation dispute to exist among TWA's passenger service employees and authorized a mail ballot election to resolve the dispute.

25. *Voting Period And Count Date Determined.* On February 27, 1986, the NMB informed TWA that the ballots would be mailed to all eligible passenger service employees on March 24, 1986 and, to be counted, would have to be returned to the NMB no later than April 28, 1986 at 2:00 P.M., E.D.S.T., and that the ballots would be counted immediately thereafter on April 28, 1986.

26. *Flight Attendant Strike And Picketing Commenced.* On March 7, 1986, IFFA, the labor organization representing TWA's flight attendants for purposes of collective bargaining

under the Railway Labor Act, commenced a lawful strike and picketing against TWA for the purpose of forcing TWA to accept IFFA's proposals for a new collective bargaining agreement to replace the agreement between TWA and IFFA which had expired July 31, 1984. Prior to the IFFA strike, TWA and IFFA had utilized and exhausted all of the applicable notice, conference, mediation and "cooling-off" procedures mandated by the Railway Labor Act for the processing and resolution of "major disputes" over the formation of a new contract, but had failed to reach agreement on a new contract. The IFFA strike was a exercise by IFFA of "self-help" under the Railway Labor Act.

27. *Flight Operations Initially Reduced.* Initially, the IFFA strike which began March 7, 1986, caused TWA to reduce its scheduled flight operations below pre-strike levels.

28. *Lawful Response To Operate with Temporary Flight Attendants.* TWA had made a management decision, in anticipation of a possible IFFA strike, and, once the IFFA strike began, it undertook to carry out that decision, to build scheduled flight operations back up to pre-strike levels as soon as feasible using as flight attendants (a) "crossovers", *i.e.*, flight attendants who elected to cross over IFFA picket lines and perform their regular flight attendant jobs, (b) new-hire permanent flight attendants, and (c), in the interim, "contingent flight attendants," *i.e.*, non-union represented employees, among others, who would volunteer to serve temporarily as flight attendants. TWA's decision to operate and to replace striking flight attendants was lawful "self-help" under the RLA, and a fulfillment of its duty to operate and to serve the flying and shipping public.

29. *Temporary Assignment Of Volunteer Passenger Service Employees.* Pursuant to its management decision TWA assigned, on and after March 7, 1986, approximately 1,200 non-union employees, all of whom had volunteered, to serve temporarily as flight attendants pending TWA's hiring and training of permanent replacement flight attendants. Of these volunteers 339 were passenger service employees on the list of

potentially eligible voters furnished by TWA to the NMB on February 6, 1986 in NMB Case No. R-5610. Of the 1,200 non-union employees temporarily and voluntarily assigned to serve as flight attendants, all had been released and returned to their regular assignments by May 16, 1986. Of the 339 passenger service employees temporarily and voluntarily assigned to serve as flight attendants, all had been released and returned to their regular passenger service assignment by May 16, 1986, except a small number who had applied for transfer to *permanent* flight attendant positions and whose applications for *permanent* transfer had been accepted (and whose exclusion from the eligibility list has never been disputed).

30. *Temporariness Of Assignments.* All TWA personnel, including passenger service employees, who served temporarily and voluntarily as flight attendants since March 7, 1986 were informed by TWA management prior to assuming their assignments that the assignments were temporary and that they would be returned to their regular work assignments as soon as possible. This same directive was communicated to all TWA managers who supervised employees temporarily and voluntarily assigned as flight attendants. All temporary flight attendants were advised that permanent flight attendant jobs could be obtained only by formal application and acceptance.

31. *Status Of Volunteering Passenger Service Employees Not Changed.* TWA never altered the employment status of any employees assigned temporarily and voluntarily as flight attendants by virtue of their performance of flight attendant work, as reflected on such persons' employment records. The job titles of persons who served as temporary flight attendants always reflected and continues to reflect their regular positions. Furthermore, passenger service employees temporarily and voluntarily assigned as flight attendants continued, while serving as such, to receive the pay applicable to their regular positions, except when the flight attendant position to which they were temporarily assigned had a greater rate of pay.

32. *Eligibility Of Passenger Service Volunteers.* The passenger service volunteers performing as temporary flight atten-

dants were all on the February 6, 1986 potential voter eligibility list, were all sent mail election ballots by the NMB on or after March 28, 1986, and were all provided the opportunity to return ballots in the election.

33. *IBT Request For List Of Employees Working As Flight Attendants.* On March 24, 1986, in NMB Case No. R-5610, the IBT, by its counsel, requested the NMB to direct TWA to furnish to the Board a list of "all passenger service craft or class employees now working as flight attendants," because:

> "Eligibility questions in the ongoing passenger service craft or class election may be raised by this situation, *particularly where permanent replacement status has been offered.*"

34. *Flight Operations Back To Pre-Strike Levels.* On March 30, 1986, TWA's scheduled flight operations reached 100% of pre-strike levels, partly as a result of the assignment of volunteering passenger service employees as temporary flight attendants.

35. *TWA Ordered To Furnish List Requested by IBT.* On April 2, 18 and 21, 1986, the NMB's Executive Director "ordered" TWA to furnish the NMB with a list of "all employees presently on the eligibility list and working in another craft or class," on the ground that: "the information ordered by the Board is necessary for the Board to comply with Section 2 Ninth of the Railway Labor Act which requires the Board to designate who may participate as eligible voters in representation elections." The NMB issued these orders without addressing TWA's stated position that it would provide the names of employees permanently transferred to flight attendant positions, but that it should not be required to provide the names of those temporarily working as flight attendants, since they were temporary employees, within the NMB's own definition, as to the flight attendant craft or class, and were at the time the subjects of serious violence and harrassment.

36. *IBT Request To Extend Voting Period.* On April 22, 1986, the IBT, by its counsel, requested the NMB, "unless the

Board intends to delete from the eligibility list all former [sic] passenger service agents now employed as TWA flight attendants," to extend the voting period for two weeks past April 28, 1986, in order "to enable the organizations effectively to communicate with these employees regarding the election."

37. *Ongoing Return Of Passenger Service and Other Volunteers To Regular Assignments.* Throughout the month of April 1985, TWA was recruiting, training and graduating new-hire flight attendants, and, concommitantly, releasing and returning large numbers of persons, including passenger service employees, serving temporarily and voluntarily as flight attendants, to their regular TWA jobs. On April 28, 1986, TWA announced that its travel college had ended its recruitment of flight attendant trainees until further notice, because it had a sufficient number of applicants and the program had therefore attained its objective.

38. *Meetings With Mediator On Eligibility Questions.* On April 25 and April 28, 1986, Joseph Anderson, the mediator assigned by the NMB to Case No. R-5610, conducted meetings in Washington, D.C., at TWA's request, among representatives of TWA and the three unions for the purpose of resolving disputes over the voting eligibility of various individuals on the list of passenger service employees submitted by TWA on February 6, 1986. At the meeting on April 25, 1986, TWA furnished the NMB with, *inter alia*, the names of the 27 employees on that list who had applied and been selected to be *permanently* transferred to regular flight attendant positions; those 27 were ruled ineligible by Anderson. At these meetings, the IBT, alone among the parties, took the position that *any* passenger service employee who was performing flight attendant work, however temporarily, not just those 27 permanently transferred to regular flight attendant positions, should be deemed ineligible to participate in the election. The IBT also took the position at these meetings that passenger service employees who had been on medical leave or furlough in excess of two years, also should be deemed ineligible to vote.

39. *Employees Working As Temporary Flight Attendants Ruled Eligible By Mediator; Ruling Appealed.* On April 25 and 28, 1986, in NMB Case No. R-5610, Mediator Anderson ruled that passenger service employees who were temporarily performing flight attendant work, would be eligible to vote in the election. On April 28, 1986, the IBT filed with the NMB an appeal from Mediator Anderson's said ruling. The appeal consisted of an assertion by counsel, without any supporting evidence, that "their recall is speculative." The IBT noted that it "concurs in [Mediator Anderson's] ruling that employees permanently assigned as flight attendants are ineligible," and added: "should the Board deny this appeal, however, then, and only then, does the IBT seek a two week voting extension." On or about May 2, 1986, TWA, IAM and IFFA filed statements in support of Mediator Anderson's said ruling. TWA's statement was supported by affidavit and other evidence.

40. *Employees On Leave Up To 5 Years Ruled Eligible By Mediator; Ballot Count Deferred.* On April 28, 1986, Mediator Anderson also ruled, in accord with Company policy, that passenger service employees on furlough or medical leave for up to five years also would be eligible to vote. At the same time, Anderson informed the meeting participants that his eligibility determinations could be appealed to the NMB no later than May 2, 1986, that the ballots would not be counted on April 28, 1986, as previously scheduled, and that the ballots would be impounded pending resolution of any appeals.

41. *NMB AND IBT Aware That Eligibility of Temporary Flight Attendants Was Potentially Dispositive of Election.* Upon information and belief, on April 28, 1986 when the NMB impounded the ballots, it and the IBT believed that (A) a majority of the eligible voters had not or may not have cast ballots and (B) that the chances of one or another union achieving the "majority of a majority" necessary for certification would be increased by deleting from the original eligibility list the names of passenger service members temporarily working as flight attendants on April 28, 1986, because such deletion would reduce the number of eligible voters without significantly reducing the number of valid ballots cast for union representation. Upon in-

formation and belief, the IBT repeatedly contacted NMB members and representatives between April 28 and May 13, 1986, in an effort to have said passenger service employees excluded as eligible voters.

42. *TWA Ordered To Furnish List of Eligible Employees "Temporarily" Working Outside Passenger Service Craft or Class.* On April 30, 1986, the NMB's Executive Director sent the following communication to TWA "ordering" TWA, for the first time, to furnish it with a list of "all the employees on the eligibility list who were *temporarily* working outside the craft or class of passenger service employees on April 28, 1986" (Ex. A):

> ON APRIL 2, 1986, THE NATIONAL MEDIATION BOARD (BOARD) ORDERED TRANS WORLD AIRLINES (TWA) TO FURNISH THE BOARD A LIST OF ALL EMPLOYEES PRESENTLY IN THE ELIGIBILITY LIST AND WORKING IN ANOTHER CRAFT OR CLASS. IN ANOTHER TELEX, DATED APRIL 18, 1986 (RESENT ON APRIL 21 BECAUSE OF TRANSMISSION ERROR), TWA WAS ORDERED TO FURNISH THE INFORMATION TO BOARD REPRESENTATIVE JOSEPH ANDERSON ON APRIL 25, 1986. *TWA, ON APRIL 25, 1986, FURNISHED BOARD REPRESENTATIVE ANDERSON THE NAMES OF THOSE EMPLOYEES' PERMANENTLY TRANSFERRED TO THE FLIGHT ATTENDANTS CRAFT OR CLASS. TWA IS HEREBY ORDERED TO FURNISH THE BOARD THE NAMES OF ALL THE EMPLOYEES ON THE ELIGIBILITY LIST WHO WERE TEMPORARILY WORKING OUTSIDE THE CRAFT OR CLASS OF PASSENGER SERVICE EMPLOYEES ON APRIL 28, 1986.* AS THE BOARD STATED EARLIER, THIS INFORMATION IS VITAL FOR THE BOARD TO COMPLY WITH SECTION 2, NINTH, OF THE RAILWAY LABOR ACT WHICH REQUIRES THE BOARD TO DESIGNATE WHO MAY PARTICIPATE AS ELIGIBLE VOTERS IN REPRESENTATION ELECTIONS. THIS INFORMATION

SHOULD BE SUBMITTED IN WRITING TO THE BOARD NO LATER THAN 5:00 P.M., FRIDAY, MAY 2, 1986. (emphasis added)

On May 2, 1986, TWA appealed this "order" to the NMB.

43. *NMB's Ruling On Appeal; Employees Serving As Temporary Flight Attendants Deleted From Eligibility List.* On May 13, 1986, the NMB sustained the IBT's appeal on the point at issue in this action, and issued a "Determination of Eligibility Order," 13 NMB No. 63 (Ex. B). The Determination did not address or rule whether the subject employees were "temporarily" working outside the craft or class or whether they had, within the Board's definition (Manual, Section 5.302), "a reasonable expectation of continued employment or reemployment in the [Passenger service] craft or class." It contained only the following findings that the passenger service employees correctly described in the NMB Executive Director's "order" of April 30, 1986 as "*temporarily* working outside the craft or class of passenger service employees on April 28, 1986" were now deemed ineligible to vote, whereas employee on medical leave or furlough for no more than *five years* were eligible:

I

"In the present case, the key date for eligibility purposes is the count of April 28, 1986. The Board stated in *Chicago & North Western Railway Company*, 4 NMB 240 (1965) that:

> "In representation disputes the Act deals with the present status and the present interest of the employees involved and not with potential future status and potential future interests of the employees. The Board has long adhered to the established and recognized practice to vote employees in the one craft in which they are employed at the time of the election.

"In the previous TWA case involving the craft or class of Passenger Service Employees, NMB Case No. R-5163, the Board considered the eligibility of TWA employees

who were working in another craft of class. In *Trans World Airways, Inc.*, 8 NMB 663 (1981), the Board stated:

> "Under TWA's employment system, a furloughed employee may be 'rehired' in a different job and still retain recall rights to his original position. However, this does not alter the basic fact that the employee is still a TWA employee, and is employed in a position outside of the craft or class. These employees have a present interest in their present craft or class whether on the cut-off date or currently, rather than their former craft or class. Therefore, employees working in other crafts or classes either on the cut-off date or at the present time are ineligible.

"For the above reasons, the Board finds that all employees working as "contingent flight attendants" on April 28, 1986, are ineligible to vote in NMB Case No. R-5610.

II

"Because of the above finding, it is unnecessary for this Board to rule upon the IBT's request to extend the voting period.

* * *

V.

"It is stated in the Carrier's position statement that TWA has a five-year return policy for employees on medical leave. According to Section 5.306 of the NMB Representation Manual, employees on "authorized sick leave" are eligible. For these reasons, the Board finds that Mr. Anderson's determination was made in accordance with Board procedure and policy and is correct.

VI.

"The Carrier has a five-year policy regarding furloughs. These employees have systemwide recall rights. Section 5.305 of the NMB Representation Manual states:

> "Furloughed employees are considered eligible in the craft or class in which they last worked provided they retain an employer-employee relationship and have a reasonable expectation of returning to work.

44. *TWA Motion For Reconsideration.* On May 14, 1986, TWA filed with the NMB a motion requesting the NMB to:

> "1. Reconsider and reverse its determination dated May 13, 1986 that "contingent flight attendants" are ineligible to vote;
>
> "2. In the alternative, agree to reconsider this eligibility question if, after the vote count, the eligibility of "contingent flight attendants" could be determinative of the election outcome;
>
> "3. If contingent flight attendants are declared ineligible, use the actual count date *May 16, 1986* to determine eligibility, not the former count date of April 28, 1986;
>
> "4. Impound, preserve, seal and retain the ballots of "contingent flight attendants," should said ballots not be counted on May 16, 1986; and
>
> "5. In order to protect the personal safety of contingent flight attendants and their families, provide the highest degree of confidentiality which the Board determines possible concerning the names of contingent flight attendants."

45. *Motion Denied; Names Furnished.* On May 15, 1986 (copy of *TWA*, 13 NMB No. 64 annexed as Exhibit C hereto), the NMB denied TWA's motion of May 14, 1986, and TWA then furnished the NMB with the names of the 302 passenger service employees temporarily and voluntarily assigned as flight attendants as of April 28, 1986.

46. *Temporary Flight Attendants Released As Complement of Permanents and Crossovers Attained.* Consistent with TWA's prior pronouncement, all 302 TWA passenger service employees temporarily and voluntarily performing flight attendant work on April 28, 1986, were returned to their regular passenger service positions by May 16, 1986 and were otherwise

eligible to vote in the election. TWA was able to release them as temporary flight attendants by that date, because a complement of 4,063 permanent flight attendants was attained by that date through the hiring of 2,766 new employees as flight attendants and the reporting to work of 1,297 flight attendants ("cross-overs") already employed when the strike began.

47. *Ballots Counted.* On May 16, 1986, the ballot count was conducted at the NMB offices in Washington, D.C. Pursuant to the NMB's May 13 and May 15, 1986 rulings, the names of the 302 passenger service employees who on April 28, 1986 were temporarily and voluntarily performing flight attendant work were stricken from the voter eligibility list by the NMB, and their ballots, if any were returned to the NMB, were not counted. This action was taken notwithstanding the fact that as of May 16, 1986, *all* 302 of these passenger service employees had returned to their regular passenger service work.

48. *Election Results.* At the conclusion of the May 16, 1986 ballot count, Mediator Anderson issued a "Report of Election Results" (copy annexed as Exhibit D hereto), showing the following results of the tabulation of ballots cast in the election:

1. Number of eligible voters	4,330
2. Void ballots	22
3. Votes Cast for IAM	1,279
4. Votes Cast for IBT	935
5. Votes Cast for IFFA	36
6. Valid votes counted (sum of 3, 4 and 5)	2,250

Thus, with the disenfranchisement of the 302 passenger service employees temporarily assigned to flight attendant positions on April 28, 1986, all of whom had returned to their regular passenger service positions by May 16, 1986:

(A) a 52% majority (2,250 of 4,330) of the eligible voters cast valid ballots, the other 48% of the eligible voters thereby indicating their preference for no union representation,

(B) a 57% majority (1,279 of 2,250) of the eligible voters who cast valid ballots voted for representation by the

IAM, which therefore received sufficient votes to be certified as representative of the passenger service craft of class on TWA in Case No. 5610, notwithstanding only 29.5% (1,279 of 4,330) of the eligible voters had voted for representation by the IAM.

49. *Outcome Of Election Determined By Deletion From Eligibility List.* Because of the narrow election margin, the eligibility of passenger service employees disenfranchised by the NMB's ruling on appeal of May 13, 1986, is determinative of the outcome of the election. Had those 302 passenger service agents been deemed eligible, the total number of eligible voters would have increased from 4,330 to 4632. This would have required an increase of 67 (2,250 to 2,317) in the total number of valid ballots cast in order for any union to be certified as representative of the passenger service craft or class in Case No. R-5610.

50. *Uncounted Ballots Being Preserved.* On May 22, 1986, the NMB notified TWA in writing that it would preserve the ballots of the passenger service employees on the original voter eligibility list who had been working temporarily as flight attendants on April 28, 1986, "for at least one year from the date the representation case was closed by certification or dismissal."

51. *IAM Certified; Negotiations Demanded.* On May 23, 1986, in Case No. R-5610, the NMB issued a certification (copy annexed as Exhibit E hereto) of the IAM as the representative of the craft or class of passenger service employees employed by TWA. On May 29, 1986, the IAM wrote TWA (copy of IAM letter annexed as Exhibit F hereto) demanding negotiations.

VIOLATION OF RLA IN REPRESENTATION DISPUTE

52. *RLA Sections 2, Fourth and Ninth Violated.* The NMB's deletion, from the eligibility list in Case No. R-5610, of the names of the 302 passenger service employees temporarily assigned as flight attendants on April 28, 1986, on the ground that they were "working regularly" in the flight attendant craft

or class on that date, is prejudicial to TWA, and is prejudicial to the rights of TWA's passenger service employees under RLA Sections 2, Fourth and Ninth, freely to determine whether to select a representative. Further, said deletion is a gross and egregious violation of the NMB's duties under the RLA, and a gross and egregious exceeding of the NMB's powers under the RLA, including its duty to investigate disputes among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of the RLA (RLA § 2 Ninth, first sentence) and its power to designate who may participate in an election and to establish the rules to govern the election (RLA § 2 Ninth, fourth sentence).

INJUNCTIVE RELIEF NECESSARY AND APPROPRIATE

53. *Irreparable Injury.* The unlawful actions of the NMB will, unless restrained and enjoined, result in irreparable injury and loss to TWA, its employees, and to the public, in the following respects:

(a) TWA will be required by law to bargain with an unlawfully and improperly certified organization purporting to be the exclusive bargaining representative of its passenger service employees. In the event TWA refuses to recognize and bargain with said organization, it faces the immediate and severe risk of irreparable injury and loss of customer good will and revenue due to strikes, picketing, and other disruptions to service authorized and directed by such certified representative. In the event TWA engages in bargaining with said organization, it risks similar irreparable injuries from economic actions by the disenfranchised passenger service employees.

(b) TWA will be exposed to threats of strikes, work stoppages, picketing and other disruptions in service by a certified bargaining representative which was illegally certified by the NMB;

(c) TWA will be exposed to threats of criminal prosecution, pursuant to RLA Section 2, Tenth, 45 U.S.C.

§ 152, Tenth, for refusing to recognize and/or bargain with a certified representative;

(d) The disenfranchised passenger service volunteers will be deprived of their constitutional and RLA rights and will have foisted upon them a representative which they had no part in selecting; the entire TWA craft or class of passenger service employees will have foisted upon them a collective bargaining representative which may well be contrary to the current will of the majority as it was in each previous NMB election;

(e) TWA and the public will be faced with substantial risk of disruptions to service resulting from disputes between the contending unions and between those employees permitted to participate in the election and those wrongfully excluded from participation;

(f) Disruptions in service resulting because of the conflicts between the union and/or employees will deprive TWA of substantial operating revenues, cause diversion of passengers and cargo from TWA to competing airlines and to other systems and forms of transportation, and irreparably injure TWA's goodwill and reputation;

(g) Said disruptions will interrupt interstate commerce, contrary to the express purposes of the RLA, 45 U.S.C. § 151(a)(1); and

(h) The orderly and peaceful labor relations presently existing between TWA and its passenger service employees will be irreparably impaired.

54. *Greater Injury To TWA, Employees And Public.* As to each item of relief sought, greater injury would be inflicted upon the Plaintiff, its employees and the public by the Court's refusal to grant the relief sought herein, than the NMB or IAM would suffer by the Court's granting the relief.

55. *No Adequate Remedy At Law.* Plaintiff has no adequate remedy at law for the injuries threatened by the unlawful conduct of the NMB.

56. *TWA's Compliance With Law.* TWA has observed, in respect of the aforesaid dispute, all of the procedures provided by law to prevent the interruption of its service and to resolve said dispute according to law.

57. *No Prior Application.* No prior application has made to this or any other court for relief requested herein.

AS AND FOR A SECOND CAUSE OF ACTION

Plaintiff repeats and realleges each and every allegation of paragraphs 1 to 51 inclusive.

INTERFERENCE WITH TWA'S STATUTORY RIGHTS OF SELF-HELP IN PENDING "MAJOR DISPUTE" WITH FLIGHT ATTENDANTS

58. *RLA "Major Dispute" Provisions Violated.* The NMB's disenfranchising, for purposes of the representation election in Case No. R-5610, of otherwise eligible employees whom TWA had temporarily assigned as flight attendants in order to be able to operate its airline, and to serve the flying and shipping public, during the IFFA strike for a new flight attendant contract, wrongfully interferes with, chills and inhibits TWA's exercise of its rights under the "major dispute" provisions of the RLA (RLA Sections 2, Seventh; 5, First; and 6) to resort to lawful "self-help" for the purpose of resolving its pending "major dispute" with IFFA over changes in the former flight attendant contract which expired August 31, 1984, including its self-help right to replace striking flight attendants temporarily with its own non-union employees as well as permanently with new hire flight attendants.

AS AND FOR A THIRD CAUSE FOR ACTION

Plaintiff repeats and realleges each and every allegation of paragraphs 1 to 57 inclusive.

59. *Employees' Constitutional Rights Violated.* The NMB's disenfranchising of otherwise eligible passenger service employ-

ees who volunteered to cross IFFA picket lines and perform flight attendant work during the IFFA strike constitutes a violation of those persons' Constitutional rights, as protected by the First and Fifth Amendments of the United States Constitution, which provide in relevant part as follows:

AMENDMENT I

> *Congress shall make no law* respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech*, or of the press; *or the right of the people peaceably to assemble*, and to petition the Government for a redress of grievances.

AMENDMENT V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

Emphasis added.

60. *Rights of Association and Speech Violated.* The decision of the disenfranchised employees to cross IFFA picketlines and perform flight attendant work, to associate with TWA and to refrain from associating with the striking IFFA members, constitutes an exercise of their Constitutional rights of symbolic speech and freedom of association protected by the First Amendment, which fundamental rights were trampled upon

and transgressed by the NMB's determination that such persons are ineligible to vote by virtue of their exercise of their Constitutional rights.

61. *Equal Protection Denied.* The decision of the NMB, to the extent it afforded the representation election franchise to members of the passenger service craft or class who were on medical leave, leave of absence, or furlough for up to five years as of the April 28, 1986 "count date", and who had not worked in the passenger service craft or class for up to five years as of said "count date", while disenfranchising members of the craft or class not on leave or furlough but who had been working as flight attendants *for no more than 40 days* as of said "count date" and who, all of them, had returned to their regular passenger service jobs as of the date (May 16, 1986) the ballots were actually counted, and who were declared ineligible solely by virtue of the fact that they were temporarily working as flight attendants as of said "count date," violates the disenfranchised employees' right to equal protection of the laws under the Fifth Amendment of the United States Constitution.

AS AND FOR A FOURTH CAUSE FOR ACTION

Plaintiff repeats and realleges each and every allegation of paragraphs 1 to 61 inclusive.

62. *New Election Rule Made Without Notice and Comment Required by APA.* The NMB's disenfranchising of the 302 passenger service employees because they were temporarily performing flight attendant work as of the "count date," even though they had certain, not to mention reasonable, expectation of continued employment or reemployment in the passenger service craft or class, constituted the making by the NMB of a new rule for elections without affording opportunity for notice and comment as required by the Administrative Procedure Act, 5 U.S.C. § 553.

AS AND FOR A FIFTH CAUSE OF ACTION

Repeats and realleges each and every allegation of paragraphs 1 to 62 inclusive.

63. *Form of Ballot Not Unambiguous and Not Neutral.* The form of ballot used by the NMB in the election it conducted in NMB Case R-5606, because it did not provide a space for voting for "no union," did not unambiguously and neutrally convey to each eligible employee the choices available to him, including the choice of not selecting a collective bargaining representative, and thereby exceeded the NMB's authority in representation matters under RLA Sections 2, Fourth and Ninth.

AS AND FOR A SIXTH CAUSE OF ACTION

Plaintiff repeats and realleges each and every allegation of paragraphs 1 to 63 inclusive.

64. *Failure To Investigate Whether Employees Working "Temporarily" As Flight Attendants.* The NMB failed to hold a hearing on, or to address or rule on, or, upon information and belief, otherwise to investigate, the question of whether the 302 passenger service employees whose eligibility was in dispute between TWA and the IBT were *temporarily* working in the flight attendant craft or class, *i.e.*, had a reasonable expectation of continued employment, within the meaning of the Board's election rule 5.302, in the passenger service craft or class. This failure is evidenced by the NMB's own ruling on appeal, which reversed Mediator Anderson's ruling of eligibility on the basis of an irrational and irrelevant analogy to furloughed passenger service employees who were subsequently rehired into, and who were regularly working at the time of the election in, another craft or class. This failure constitutes a violation of the NMB's duty "to investigate" under RLA Section 2, Ninth, and a denial of due process of law to TWA and its passenger service employees in violation of the Fifth Amendment of the United States Constitution.

AS AND FOR A SEVENTH CAUSE OF ACTION

Plaintiff repeats and realleges each and every allegation of paragraphs 1 to 64 inclusive.

65. *NMB's Violation of RLA Duty of Neutrality.* Upon information and belief, the NMB reversed Mediator Anderson's ruling that the passenger service employees temporarily working as flight attendants on April 28, 1986 were eligible to vote, following communications by IBT to Board members and representatives, in order to reduce the number of eligible voters without significantly reducing the number of valid ballots cast for representation by a union, and thereby to improve the chances of the election resulting in selection of a representative. The NMB thereby violated its duty of neutrality under the Railway Labor Act.

AS AND FOR AN EIGHTH CAUSE OF ACTION

Plaintiff repeats and realleges the allegations of paragraphs 1 to 65 inclusive.

66. *Certification Based on Artificial Majority for Representation, Not Actual Plurality Not For Representation.* To express a preference for no union representation, it was necessary for an eligible voter *not* to cast a valid ballot. A 48% plurality of eligible voters did not cast valid ballots. A 29.5% minority of eligible voters cast valid ballots for the IAM. Smaller minorities cast valid ballots for the IBT and for IFFA. No majority or even plurality voted for any one of the three unions. By pooling the votes cast for all three unions, there is an artificial and fictional majority of eligible voters, one which never voted for the same union. The NMB relied on said artificial and fictional majority of eligible voters, and failed to give effect to the actual plurality of eligible voters who did not cast valid ballots, in certifying the IAM, thereby violating RLA § 2 Fourth, second sentence.

WHEREFORE, plaintiff prays that this Court:

1. Issue a preliminary injunction and order, the same to be made permanent on final judgment:

A. Setting aside the certification issued by the NMB in Case No. R-5610 on May 23, 1986;

B. Requiring the NMB to properly complete its investigation of the representation dispute in Case No. R-5610 by retabulating the ballots cast in the election, including as eligible voters all 302 passenger service employees temporarily assigned as flight attendants on April 28, 1986, *i.e.*, the employees covered by Part I of the NMB's ruling on appeal of May 13, 1986 (13 NMB No. 63 at pages 215-216), and named on the list furnished by TWA to the NMB on May 15, 1986;

C. Requiring the NMB to properly continue and conclude its investigation in Case No. R-5610 on the basis of said retabulation and its rules governing elections; and

D. Enjoining and restraining the IAM from demanding negotiations with TWA in behalf of the passenger service craft or class on TWA pending final disposition of this action and unless and until properly certified by the NMB as representative of the craft or class;

2. Issue a declaratory judgment setting forth the respective rights and obligations of the parties in the premises; and

3. Granting such other, further or different relief to which the plaintiff may be entitled in the premises.

Respectfully submitted,

/s/ ERIC ROSENFELD

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Attorney in Charge For Plaintiff

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STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

VERIFICATION

ROBERT F. ALLEN, being first duly sworn, deposes and states:

I am Senior Vice President-Employee Relations of Trans World Airlines, Inc. and am authorized to execute this verification on behalf of Trans World Airlines, Inc. The allegations stated in the foregoing complaint are based on facts and information presently available to Trans World Airlines, Inc. On behalf of Trans World Airlines, Inc., I have read the foregoing allegations and believe them to be true.

/s/ ROBERT F. ALLEN
Robert F. Allen

Subscribed and sworn
to before me this 6th
day of June, 1986

/s/ MICHAEL A. KATZ
Notary Public
Michael A. Katz
Notary Public, State of New York
No. 31-4688749
Qualified in New York County
Commission Expires March 30, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-86-2350

TRANS WORLD AIRLINES, INC. ("TWA"),
Plaintiff,

—v.—

NATIONAL MEDIATION BOARD ("NMB"),
an agency of the UNITED STATES OF AMERICA

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO ("IAM")

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS AND WAREHOUSEMEN OF AMERICA ("IBT")

—and—

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS ("IFFA"),
Defendants.

PLAINTIFF'S FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS

TO: Theodore Hirt, Esq.
Eugene A. Beatty, Esq.
United States Department of Justice
10th and Penn. Avenue, N.W.
Civil Division—Room 3342
Washington, D.C. 20530
(202) 633-3358

Attorneys for National Mediation Board, Defendant

Wilma B. Liebman, Esq.
Int'l Bro. of Teamsters
25 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 624-7464

Attorney for Int'l Bro. of Teamsters, Defendant

Plaintiff Trans World Airlines, Inc. ("TWA") by its attorneys, pursuant to FRCP 33 and 34, serves the following interrogatories and document request upon Defendants National Mediation Board ("NMB") and Defendant International Brotherhood of Teamster, Chauffeurs, and Warehousemen of America ("IBT"). Both Defendants shall answer each of the following interrogatories under oath, in writing, separately, in the fullest detail possible, and in accordance with the definitions and instructions set forth below. Both Defendants shall produce all documents identified in response to the interrogatories. All responses shall be signed by the person making them, and a copy of the responses and documents, together with objections, if any, shall be served upon counsel for TWA or produced for Plaintiff's inspection and copying at the offices of Seyfarth, Shaw, Fairweather and Geraldson, 757 Third Avenue, New York, New York 10017 no later than thirty days from the date of service. Furthermore, pursuant to FRCP 26(e), each Defendant is under a duty seasonably to supplement its response to any interrogatory addressed to (1) the identity and location of persons having knowledge of discoverable matters, and (2) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony. In addition, each Defendant is under a duty to amend a prior response if it obtains information on the basis of which it knows that the response was incorrect when made, or that the response, though correct when made, is no longer true, and the circumstances are such that a failure to amend the response is, in substance, a knowing concealment.

DEFINITIONS AND INSTRUCTIONS

1. "TWA" refers to Plaintiff Trans World Airlines, Inc., and each of its present and former representatives as defined herein.

2. "NMB" refers to the National Mediation Board, an agency of the United States of America and each of its present or former members, staff members or representatives as defined herein.

3. "IBT" refers to the International Brotherhood Teamsters Chauffeurs and Warehousemen of America and each of its present or former representatives as defined herein.

4. "Representative" means any and all agents, employees, servants, officers, directors, attorney, or other persons acting or purporting to act on behalf of the person in question.

5. "Person" means any natural individual in any capacity whatsoever or any entity or organization, including divisions, departments, and other units therein, and shall include, but shall not be limited to, a public or private corporation, partnership, joint venture, voluntary or unincorporated association, organization, proprietorship, trust, estate, governmental agency, commission bureau, or department.

6. "Document" means any medium upon which intelligence or information can be recorded or retrieved, and includes, without limitation, the original and each copy, regardless of origin and location, of any book, pamphlet, periodical, letter, memorandum (including any memorandum or report of a meeting or conversation), invoice, bill, order form, receipt, financial statement, accounting entry, diary, calendar, telex, telegram, cable, report, record, contract, agreement, study, handwritten note, draft, working paper, chart, paper, print, laboratory record, drawing, sketch, graph, index, list, tape, photograph, microfilm, data sheet or data processing card, or any other written, recorded, transcribed, punched, taped, filmed, or graphic matter, however produced or reproduced, which is in your possession, custody, or control or which was, but is no longer, in your possession, custody, or control.

7. "Communication" means any oral or written utterance, notation, or statement of any nature whatsoever, by and to whomsoever made, including, but not limited to, correspondence, conversations, dialogues, interviews, consultations, agreements, or other forms of interaction between or among two or more persons.

8. "Identity", when used in reference to (a) a natural individual, requires a response to state his full name, residential or business addresses, his position or title and the person he represents (b) a corporation, requires a response to state its full corporate name and any names under which it does business, its state of incorporation, and the address of its principal place of business; (c) a business, requires a response to state the full name or style under which the business is conducted, its business address or addresses, the types of business in which it is engaged, the geographic areas in which it conducts those business, and the identity of the person or persons who own, operate, or control the business; (d) a document, requires a response the state the number of pages and the nature of the document (e.g., letter or memorandum), its title, its date, the name or names of its authors and recipients, and its present location and custodian, or alternatively that it simply be attached to the answers to these interrogatories, making reference to the document in the answer to the relevant interrogatory; (e) a communication, requires the response, if any part of the communication was written, to identify the document or documents which refer to or evidence the communication, and, to the extent that the communication was nonwritten, to identify the persons participating in the communication and to state the date, manner, place, and substance of the communication.

9. When an interrogatory requires a party to "state the basis of" a particular claim, contention, allegation, act information, or practice, state in the answer the identity and nature of each and every communication, fact, authority, source or event which pertains to, which was the basis, in whole or in part, of, or which the party thinks supports, refers to or evidences such claim, contention, allegation, act, information or practice.

10. With respect to each interrogatory, in addition to supplying the information requested, a response must identify all documents that concern, support, refer to, relate to or evidence the subject matter of each interrogatory and answer.

11. If any or all documents identified in the answers are no longer in a party's possession, custody, or control because of destruction, loss, or any other reason, then do the following with respect to each and every such document: (a) describe the nature of the document (e.g., letter or memorandum); (b) state the date of the document; (c) identify the persons who prepared or sent and received the original and any copies of the document; (d) state in as much detail as possible the contents of the documents; and (e) state the manner and date of disposition of the document.

12. If a party contends that it is entitled to withhold from production any documents identified on the basis of the attorney-client privilege, the work-product doctrine, or other ground, then do the following with respect to each and every such document: (a) describe the nature of the document (e.g., letter or memorandum); (b) state the date of the document; (c) identify the persons who prepared or sent and received the original and any copies of the documents; (d) state the subject matter of the document; and (e) state the basis for the contention that the document can be withheld from production.

13. As used herein, "and" as well as "or" shall be construed either disjunctively or conjuctively as necessary to bring within the scope of the interrogatory or instruction or definition all matter which might otherwise be outside its scope.

14. As used herein, the singular shall always include the plural, the present tense shall always include the past tense, and masculine pronouns shall always include the feminine and neuter pronouns.

INTERROGATORIES

INTERROGATORY NO. 1

Identify each person answering these interrogatories.

INTERROGATORY NO. 2

Has each person identified in response to Interrogatory No. 1 made such inquiry of Defendant's representatives and other persons in its control and has he made or caused to be made such examination of all documents relating to the subject matter of these interrogatories as will enable him to answer these interrogatories as completely and accurately as he possibly can?

INTERROGATORY NO. 3

Identify each person consulted by each person identified in response to Interrogatory No. 1 with respect to the latter's preparation of a response to any of these interrogatories and, as to each of the former, state: (a) why he was consulted; (b) each interrogatory with respect to which he was consulted; and (c) what information or documents he provided to assist in the preparation of the responses to these interrogatories.

INTERROGATORY NO. 4

Identify any communication between the IBT and the NMB concerning the eligibility to vote in NMB Case No. R-5610 of any person performing flight attendant work for TWA.

INTERROGATORY NO. 5

Identify any document concerning the eligibility to vote in NMB Case No. R-5610 of any person performing flight attendant work for TWA.

INTERROGATORY NO. 6

Identify any communication between the IBT and the NMB concerning the number or approximate number of ballots received by the NMB at any given time in Case No. R-5610.

INTERROGATORY NO. 7

Identify any document concerning the number or approximate number of ballots received by the NMB at any given time in Case No. R-5610.

INTERROGATORY NO. 8

Identify any communication of any kind between the IBT and the NMB which occurred between April 25 and May 13, 1986.

INTERROGATORY NO. 9

Did the NMB or IBT investigate whether the employees on the original voter eligibility list in Case No. R-5610 who were working as flight attendants on April 28, 1986 were temporarily working in the flight attendant craft or class, i.e. had a reasonable expectation of continued employment in the passenger service craft or class within the meaning of the NMB Representation Manual, Revised Edition, effective November 1, 1985 Section 5.302? If so, describe in detail (a) what the investigation consisted of and (b) what finding(s) and/or conclusion(s) resulted from the investigation.

INTERROGATORY NO. 10

Does the NMB or IBT claim in NMB Case No. R-5610, that employees "temporarily working outside a craft or class" (as defined by the April 30, 1986 Order of NMB Executive Director Quinn, Complaint Ex. A) are "employees who are working regularly in another craft or class" as defined in NMB Representational Manual, Revised Edition, effective November 1, 1985 Section 5.303? If so, state the basis for such claim.

INTERROGATORY NO. 11

Aside from the official tally of ballots, did any person engage in any formal or informal or approximate ballot count of any kind concerning any of the ballots, or part of the ballots whether eligible ballots or not, in NMB Case No. R-5610? If so, identify the count as if it were a communication as defined

herein and provide a description of the ballots counted and the reason for the count.

INTERROGATORY NO. 12

Identify any communications concerning any vote count identified in answer to the previous interrogatory.

INTERROGATORY NO. 13

On or before May 13, 1986, did the NMB or IBT have any information of any kind on the number or approximate number of ballots, whether eligible ballots or not, received by the NMB in NMB Case No. R-5610? If so, state the basis of that information.

INTERROGATORY NO. 14

On or before May 13, 1986 did the NMB or IBT have any information of any kind that a majority of eligible voters had not or may not have cast ballots in NMB Case No. R-5610? If so, state the basis of that information.

INTERROGATORY NO. 15

On or before May 13, 1986 did either the NMB or IBT have any discussion or information of any kind indicating that the chances of the election resulting in the certification of a union would be increased by deleting from the original eligibility list the names of passenger service members working as flight attendants on April 28, 1986 in NMB Case No. R-5610? If so, state the details of any such discussion and the basis for that information.

INTERROGATORY NO. 16

Does the NMB or IBT claim that the NMB found the employees on the original eligibility list who were working as flight attendants on April 28, 1986 to be ineligible to vote in NMB Case No. R-5610 for a reason other than to insure that the craft or class of TWA's passenger service employees would be repre-

sented by a labor organization? If so, state the basis for that claim.

INTERROGATORY NO. 17

State the name, address, title (if any), specialty, employer, occupation and employment address of each expert witness you expect to call to testify on your behalf. With respect to each person, state:

a) The subject matter on which such person will testify;
b) Whether such person has prepared a written report of his findings;
c) Academic or other qualifications of such persons;
d) The substance of the facts and opinions to which the expert is expected to testify;
e) A summary of the grounds for each such opinion;
f) A description of all documents and any other material which the expert relied upon or consulted in any manner in determining any facts and forming any opinions listed in answer to part (d) of this interrogatory;
g) A description of all documents and any other material which such person is expected to rely upon at trial;
h) A complete biography of the textbooks, treatises, articles and other works which such person regards as authoritative on the subject matter on which he will be testifying; and
i) The manner in which such person became familiar with the facts of the case.

DOCUMENT REQUEST

1. Produce all documents identified in response to the foregoing interrogatories.

Respectfully submitted,

/s/ ERIC ROSENFELD

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July 14, 1986

CERTIFICATE OF SERVICE

I, Eric Rosenfeld, hereby certify that a copy of Plaintiff's First Set of Interrogatories and Request for Production of Documents of Defendant Trans World Airlines, Inc. has been served upon:

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by United States mail, first class postage pre-paid on this 14th day of July, 1986.

/s/ ERIC ROSENFELD
Eric Rosenfeld

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 86-2980

TRANS WORLD AIRLINES, INC. ("TWA"),

Plaintiff,

—v.—

NATIONAL MEDIATION BOARD ("NMB"), et. al.,

Defendants.

DEBORAH K. BOLLER,

Plaintiff,

—v.—

NATIONAL MEDIATION BOARD ("NMB"), et. al.,

Defendants.

TWA'S AFFIDAVIT PURSUANT TO F.R.C.P. 56(f)

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

KATHLEEN M. MCKENNA, being duly sworn upon her oath deposes and says:

1. I am a member of the firm of Seyfarth, Shaw, Fairweather & Geraldson, counsel to TWA in the above-captioned matters. I have represented TWA throughout the course of NMB Case No. R-5610 which is the subject of the instant lawsuits and as such am personally familiar with the facts stated herein.

2. This Affidavit is submitted in (1) support of TWA's Motion To Compel Response by Defendants NMB and IBT To

Discovery, and (2) in aid of TWA's forthcoming response to Defendants NMB and IAM's motion for summary judgment. That response will, among other things, ask the Court to deny the motions for summary judgment, or grant a continuance so that discovery may be had, pursuant to Rule 56(f).

3. On June 10, 1986 TWA and Boller filed the within Complaints in the United States District Court for the Southern District of Texas. TWA's Verified Complaint alleges in pertinent part that the NMB reversed a ruling of its mediator that certain passenger service employees serving as contingent flight attendants were eligible to vote because the NMB as well as defendant IBT believed that (a) a majority of eligible voters had not cast ballots and (b) that the chances of one or another union achieving the "majority of majority" necessary for certification would be increased by deleting from the original eligibility list the names of passenger service employees temporarily working as flight attendants since such deletion would reduce the number of eligible voters without significantly reducing the number of valid ballots cast for union representation. On April 28, 1986 the original count date for the election and the date on which all ballots were impounded the NMB allegedly was aware of the number of ballots that had been cast in said election and between that date and its decision on May 13, 1986 the IBT had ex parte communications with representatives of the NMB in an effort to have said contingent flight attendants disenfranchised. TWA Complaint ¶¶ 1, 41, 64 and 65.

4. On July 14, 1986, TWA, having received IAM's answer denying the material allegations of the complaint made "upon information and belief," served upon defendants NMB and IBT TWA's First Set of Interrogatories and a Request For Production of Documents specifically designed to obtain evidence with respect to those disputed "information and belief" allegations. A copy of this discovery request is attached hereto as Exhibit A. Neither the NMB nor IBT has answered or otherwise responded to TWA's said discovery request, and both are in default.

5. The NMB, alone among the Defendants, has refused to file an answer admitting or denying the allegation in the TWA or Boller complaints. The IBT answer, on August 12, generally denies the factual allegation of misconduct, but critically admits "that the IBT believed that reducing the number of employees on the eligibility list might increase the chances for a certification of a union" (IBT Answer, par. 41). Many of the factual allegations in this matter are made "upon information and belief" in the TWA complaint because this information is primarily, if not exclusively, within the knowledge of the wrongdoers involved—the NMB and the IBT.

6. TWA's discovery is narrowly directed towards these allegations. For example, certain interrogatories are directed at the allegation that the NMB violated its duty of neutrality in order to insure that the passenger service agents would be represented by a union. Interrogatories 4 and 5 concern "any communication between the IBT and the NMB concerning the eligibility to vote in NMB Case Number R-5610 of any person performing flight attendant work for TWA"; interrogatories 6 and 8 concern NMB and IBT knowledge of ballots received; interrogatories 11 and 12 request information on formal or informal ballot counts by the NMB; interrogatory 13 concerns NMB and IBT knowledge of the number of ballots cast before the count date; interrogatory 14 concerns NMB and IBT knowledge that a majority of eligible voters had not cast ballots before the count date; and interrogatory 15 concerns NMB or IBT knowledge that the chances of an election resulting in the certification of a union would be increased by disenfranchising the passenger service agent members working temporarily as flight attendants. Likewise, other interrogatories are directed at the allegation that the NMB failed to in its statutory obligation investigate the circumstances concerning the voter eligibility of the passenger service agents in question. Interrogatory 9 concerns the scope of any such alleged investigation; interrogatory 10 requests an explanation of the results of any alleged investigation and interrogatory 16 concerns the basis of any alleged investigation.

7. On August 12, 1986, the NMB, acknowledging that "[t]he Board's response to this discovery request is due by August 18,

1986," moved in the Southern District of Texas to extend its time to respond to TWA's discovery request until 14 days after the Court rules on the motion to transfer venue, which motion had been filed on June 25, 1986. The motion was opposed by TWA, and briefed, but never decided. On August 19, 1986 the IBT joined in that request for an extension of time which was opposed by TWA on August 21, 1986 and replied to by the NMB on September 3, 1986.

8. On August 29, 1986 the District Court in Texas consolidated the Boller and TWA matters and ordered the consolidated case transferred to the District Court for the District of Columbia. On October 21, 1986, after unsuccessful appeal of this issue by the Boller plaintiff, the consolidated case was transferred to the District of Columbia.

9. Three days later, on October 24, 1986 TWA moved in this Court to compel responses to its first discovery request as neither the NMB nor IBT has responded and the District Court for the Southern District of Texas had not granted the NMB and IBT's request for an extension of time. Shortly thereafter, on October 29, 1986 plaintiff Boller noticed the deposition of Mediator Joseph E. Anderson for today, November 12, 1986, which notice of deposition invited all parties to attend and participate.

10. By order of October 27, 1986 this Court directed all motions for summary judgment to be filed by November 5, and all opposing papers to be filed by November 19, 1986. Pursuant to that order on November 4, 1986 the National Mediation Board filed a motion to dismiss or in the alternative for summary judgment and on November 5 the IAM also filed its motion for summary judgment. Also, on November 4, 1986 the NMB filed its motion for a protective order in response to TWA's motion to compel discovery. The NMB's request for protective order was joined by the IBT on November 5, 1986. On November 6, the NMB further moved for a stay of the deposition of Joseph E. Anderson for the same reasons outlined in its November 4 motion for a protective order.

11. TWA's discovery, particularly requests 4 through 16, seeks to uncover facts related to the NMB's actions and its motive, intent and knowledge at the time it made its decision to impound the ballots on April 28, 1986 and at the time it ultimately decided to disenfranchise those passenger service employees temporarily working as contingent flight attendants.

12. Because Plaintiffs' outstanding discovery requests relate to defendant NMB's and IBT's actions, motive, knowledge and intent and specifically relate to conversations, deliberations, processes and conduct to which plaintiff was not a party, plaintiff cannot otherwise obtain such information. The discovery requests identify with specificity the information sought, and the Complaint as well as the within motion papers identify the use plaintiff seeks to make of the information which is in the defendants sole possession. Plainly, this information is essential for plaintiff to establish the unlawfulness of the NMB's certification of the defendant IAM, and failure of this Court to order NMB and IBT to furnish the requested information will prevent plaintiff from having full and fair opportunity to establish both this Court's jurisdiction and the validity of its claims.

13. Plaintiff has diligently sought discovery of these facts and has moved expeditiously to resolve this discovery dispute.

/s/ KATHLEEN M. MCKENNA
Kathleen M. McKenna

Sworn to before me this
12th day of November 1986.

REGINALD E. JONES
Notary Public

Reginald E. Jones
Notary Public, State of New York
No. 31-4600483
Qualified in New York County
Term Expires March 30, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Action No. 86-2980

TRANS WORLD AIRLINES, INC. ("TWA"),
Plaintiff,

—v.—

NATIONAL MEDIATION BOARD ("NMB"), et. al.,
Defendants.

DEBORAH K. BOLLER,
Plaintiff,

—v.—

NATIONAL MEDIATION BOARD ("NMB"), et. al.,
Defendants.

TWA AFFIDAVIT IN OPPOSITION TO NMB'S AND IAM'S MOTIONS FOR SUMMARY JUDGMENT AND NMB'S MOTION TO DISMISS

STATE OF MISSOURI)
: ss.:
COUNTY OF JACKSON)

MICHAEL A. KATZ, ESQ., of full age, being duly sworn upon his oath, deposes and says:

1. I am Assistant General Counsel for TWA and am personally familiar with the facts and circumstances of NMB Case No. R-5610 and, in particular, the facts stated herein. This affidavit is submitted in opposition to NMB's and IAM's motions for summary judgment and the NMB's motion to dismiss.

2. I attended, on behalf of TWA, the pre-ballot count conferences on Friday, April 25 and Monday, April 28, 1986 at the NMB's offices in Washington, D.C. TWA had requested the conference on April 25 in order to resolve the numerous, pending voter eligibility challenges. At that conference, Teamster representatives challenged the continued eligibility of certain passenger service employees who were temporarily replacing striking flight attendants (known as "contingent flight attendants" or "CFAs"). At the conferences, TWA advised the parties and Mediator Joseph E. Anderson that:

- all employees serving as contingent flight attendants were doing so on a temporary basis and had been so advised;
- no change had been made in their job title or salary grade;
- many temporary flight attendants had already been returned to their regular jobs;
- TWA anticipated all contingents would be returned to their regular jobs by May 10;
- temporary flight attendants could receive permanent positions only upon the usual application and acceptance process; and
- in fact, there were contingent flight attendants who applied for permanent position and who were rejected.

As the parties were unable to resolve all eligibility challenges on the April 25, it was agreed that the conference would be continued on the morning of April 28.

3. On April 28, the IBT appealed certain eligibility determinations of the Mediator, specifically his decision concerning the eligibility of the contingent flight attendants. Mediator Anderson informed the parties that the ballot count, originally scheduled for 2:00 p.m. that day, was postponed pending resolution of the Teamsters' appeal and that all ballots would be impounded at 2:00 p.m. The Mediator further advised the parties that they could each designate a representative to observe the impounding of the ballots.

4. At 2:00 p.m. on April 28, I attended the impounding of the ballots. Present was Rowland Watkins, Esq. for the NMB, and representatives of each of the unions. The envelopes containing the ballots were visible during the impounding procedure. The ballots were tied in bundles which I estimated to contain between 35 and 50 ballots. I counted the number of bundles impounded as approximately forty-six (46). Thus, assuming the maximum number of ballots per bundle, approximately 2,300 ballots had been cast.

5. That same day, the Mediator advised the parties that he had struck as ineligible 381 passenger service employees from the original list of 5,010, thus establishing the new total of eligible voters (pending appeal) at 4,629. Consequently, as of April 28, for any union to be certified as a bargaining representative, at least 2,315 ballots must have been cast. It was apparent after the impounding of ballots that approximately 2,300 ballots had been cast and that, therefore, the election was very close. If the list of eligible voters was reduced by deleting the actual number of CFAs, only 2,145 ballots would be necessary to ensure a union certification. Therefore, on April 28 it was clear that resolution of the eligibility of hundreds of passenger service employees serving as contingent flight attendants could affect the outcome of the election.

Further the affiant sayeth not.

/s/ MICHAEL A. KATZ
Michael A. Katz

[SEAL]

Sworn to before me this
18th day of November, 1986.

/s/ MARZALE A. FOSDICK
Notary Public

Marzale A. Fosdick
Notary Public—State of Missouri
Commissioned in Clay County
My Commission Expires Jan. 2, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 86-2980

DEBORAH K. BOLLER,

Plaintiff,

—v.—

NATIONAL MEDIATION BOARD ("NMB"), et. al.,

Defendants.

TWA AFFIDAVIT IN OPPOSITION TO NMB'S AND IAM'S MOTIONS FOR SUMMARY JUDGMENT AND NMB'S MOTION TO DISMISS

STATE OF MISSOURI)
: ss. :
COUNTY OF PLATTE)

JOHN B. GAISER, of full age, being duly sworn upon his oath, deposes and says:

1. I am Staff Vice President, Compensation and Benefits for Trans World Airlines, Inc. ("TWA"), and am familiar with all of the facts and circumstances herein. I submit this affidavit in opposition to the NMB's and IAM's motions for summary judgment and the NMB's motion to dismiss.

2. As discussed below, a series of acts of commission and omission by the NMB, including statements made to TWA by the NMB's lead investigator in NMB Case No. R-5610, Joseph E. Anderson, indicated to TWA that at the outset of NMB Case No. R-5610 the NMB had set a course inconsistent and incompatible with its statutory obligation under Section 2 Ninth of the Railway Labor Act "to investigate" the representation dispute. Rather, it seems to TWA from these acts and statements,

outlined below, the course set by the NMB was to conduct an election without conducting an investigation as required by its own written rules, thereby punishing and making an example of TWA because of its actions adversary to the NMB in the prior 1979 and 1981 passenger service cases. In outline, those acts and statements which make out that purpose of the NMB follows.

3. On Monday, January 20, 1986, at TWA's Kansas City Administrative Center ("KCAC"), there took place TWA's first meeting with Board representative Anderson in this case. The meeting had been arranged late Friday afternoon, January 17, 1986, in a telephone call in which Mr. Anderson sought to "confirm," he said, a meeting set up by a telegram sent by him the previous Monday, January 13, 1986, to TWA's president Richard D. Pearson. That telegram requested TWA to furnish at the meeting, among other things, an alphabetized list of potential eligible voters for a passenger service election. I told Mr. Anderson that I had not known of his telegram to Mr. Pearson—indeed no such telegram has surfaced at TWA to this day—but agreed to meet with Mr. Anderson the following Monday, January 20, 1986, as he was requesting, nonetheless. At that meeting, also attended by Michael A. Katz, Esq.'s TWA's in-house labor counsel, and John T. Weise, Esq.'s outside labor counsel, Mr. Anderson thrust at us a page from the list of potential eligible voters furnished by TWA to the Board in the 1981 passenger service case, and told us: "produce a list and make it look like this; you're not going to jerk us around like you did in 1981; if you fail to cooperate, there are criminal penalties and it may have to go as high as President Reagan." Section 3.503-2 of the NMB's rules provides that, at such a first meeting with carrier representatives:

> The Board representative should determine whether the carrier intends to raise any relevant issues concerning the application. All such issues should be reduced to writing by the carrier and submitted within a time limit established by the Board representative."

Mr. Anderson, though requested to set a time for TWA's submission of a statement of issues, did not do so. Mr. Anderson's

approach at this meeting, which I would describe as unprofessional, made TWA very uneasy.

4. On Tuesday, January 21, 1986, one (1) day after TWA meeting with Mediator Anderson concerning the NMB's request for a list of potential eligible voters, the NMB issued the following telegram "order[ing]" TWA to produce the name and address labels of potential eligible voters:

> "On January 13, 1986 the National Mediation Board—Board—informed Trans World Airlines that Board representative Joseph E. Anderson will commence the investigation of NMB Case No. R-5610 at 10:00 A.M. on Tuesday January 21, 1986. In the telegram the Board requested that the carrier furnish information necessary for the Board/s investigation. This request was made pursuant to Section 2 Ninth of the Labor Act which grants the Board immediate access to Trans World Airlines/ books and records. The carrier refused to provide a list of potential eligible voters on the date designated.
>
> "The carrier is hereby ordered to provide the Board with an alphabetized list of potential eligible voters. The list must include the employee's name, employee identification number—date of hire—current status code and inactive date—if any. The carrier must also include a master list explaining all codes on the list of potential eligible voters. The list must contain all individuals with employee-employers relationship as of the last day of the last payroll period prior to January 21, 1986. *The carrier is also ordered to provide the Board with peel-off gummed labels bearing the names and addresses of those employees on the list of potential eligible voters. This information must be submitted to the Board no later than 3:00 P.M. Friday January 31, 1986.*
>
> "If the carrier is unable to provide the above information by this date TWA is hereby ordered to provide the Board with a compatible computer tape listing all of the active and inactive employees of TWA with names employee identification number—duty station or location—

job number—company seniority date—home address—current status code and inactive date—if any.

* * *

"The computer tape and other materials must be delivered to the Board by 5:00 P.M. on Friday, January 31, 1986."

5. TWA initially advised the Board that it would take time to prepare a list of some 5,000 employees in approximately 70 locations in the job titles Mediator Anderson noted along with the other identifying information. On January 29, 1986 TWA advised the Board that such a list would be available on February 7. On February 3, TWA notified the Board that the list would be completed on February 6, a day earlier than anticipated.

6. On February 4, 1986, the NMB sent TWA a long telegram containing the following new "order" to provide names and address labels to the NMB on February 6, 1986:

> "TWA stated in its letter of January 31, 1986, that the "list can be made available on February 6, 1986 at the Kansas City Administrative Center of Trans World Airlines." Please be advised that Board representative Joseph Anderson will be at the carrier's facilities in Kansas City Missouri to pick up the list of potential eligible voters. The list must contain the information requested by the Board in its order of January 21, 1986. *The carrier is also ordered to provide Board representative Anderson with peel-off gummed labels bearing names and addresses of those employees on he list of potential eligible voters.*

(Petition, Ex. 14, p. 3).

7. On February 6, 1986, a date less than three weeks after TWA had first learned (by the January 17 telephone call) that the NMB was requesting it, TWA furnished to Mr. Anderson in Kansas City the list of 5010 potential eligible voters, specifying that it was being furnished solely for purposes of determination of showing of interest. Mr. Anderson, however, repeatedly stated that that "would be the list" for the election, subject to

deletions and changes as a result of review by the parties and the Board.

8. On February 12, 1986, four business days and six calendar days after receiving from TWA on February 6, 1986, the list of potential eligible voters, the NMB issued an authorization of an all mail ballot election (Petition, Ex. 20). Whether or not, during those few days, the NMB made preliminary (pre-authorization) determinations as to craft or class, classifications, eligibility of individuals, and sufficiency of interest, as required by its rules, is not presently known to TWA. It is known to TWA that the NMB did not make the required preliminary (pre-authorization) check of authorizations against original signatures to determine the validity of the authorizations.

9. Section 11.902 of the Board's rules provides as follows:

> "*Address List*
>
> "The carrier shall either (1) furnish to the Board representative alphabetized peel-off gummed labels bearing the names and home addresses of those employees on the list of eligible or potentially eligible voters *within five business days of receipt of the Board's notification authorizing the election*; or (2) furnish to the Board a compatible computer tape of the names and home addresses of all employees on the list of potential eligible voters at the same time that the carrier provides that list to the Board representative. The Board will provide the specifications for producing a compatible computer tape upon request."

TWA received the Board's authorization of election on February 12, 1986. The fifth business day thereafter was Thursday, February 20, 1986. The Board commenced a proceeding in District Court for the District of Columbia to compel the furnishing of name and address labels on Friday, February 14, 1986, the second of those five business days.

10. Under the Board's own rules, NMB Representative Manual (Revised Edition—Effective November 1, 1985), Section 11.902, which requires name and address labels to be provided

by the carrier "within five business days of receipt of the Board's notification authorizing the election", the order of January 21, 1986 to provide name and address labels was premature in the extreme; not only was it being issued on the second business day after TWA had learned of the filing and pendency of NMB Case R-5610, but the NMB had not yet authorized an election, or even made the four or five "preliminary determinations" concerning craft or class required by its rules (Section 5.0) before an election can be authorized. On February 20, 1986, the fifth business day after TWA's receipt of the authorization, TWA provided the name and address labels, in compliance with the Board's own rules ignored by the Board itself. Thereafter, the NMB withdrew its premature action against TWA.

/s/ JOHN B. GAISER
John B. Gaiser

Sworn to before me this
18th day of November, 1986

/s/ CYNTHIA L. RHODUS
Cynthia L. Rhodus

[STAMP ILLEGIBLE]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 86-2980

TRANS WORLD AIRLINES, INC. ("TWA"),

Plaintiff,

—v.—

NATIONAL MEDIATION BOARD ("NMB"), et. al.,

Defendants.

DEBORAH K. BOLLER,

Plaintiff,

—v.—

NATIONAL MEDIATION BOARD ("NMB"), et. al.,

Defendants.

TWA AFFIDAVIT IN OPPOSITION TO NMB'S AND IAM'S MOTIONS FOR SUMMARY JUDGMENT AND NMB'S MOTION TO DISMISS

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

KATHLEEN M. MCKENNA, ESQ., of full age, being duly sworn upon her oath deposes and says:

1. I am a member of the firm of Seyfarth, Shaw, Fairweather & Geraldson, counsel to TWA in the above-captioned matters. I have represented TWA throughout the course of NMB Case No. R-5610 which is the subject of the instant lawsuits and as such am personally familiar with the facts stated herein.

2. This Affidavit is submitted in response to NMB's and IAM's Rule 12(b)(6) and Rule 56 motions for summary judgment and NMB's Rule 12(b)(1) motion to dismiss in Civil Action No. 86-2980.

3. On June 10, 1986 TWA and plaintiff Boller filed the above-captioned Complaints in the United States District Court for the Southern District of Texas. TWA's Verified Complaint alleges in pertinent part that the NMB reversed a ruling of its mediator that certain passenger service employees serving as contingent flight attendants ("CFAs") were eligible to vote because the NMB as well as defendant IBT believed that (a) a majority of eligible voters had not cast ballots and (b) that the chances of one or another union achieving the "majority of majority" necessary for certification would be increased by deleting from the original eligibility list the names of passenger service employees temporarily working as flight attendants and thereby reducing the number of eligible voters but not the number of valid ballots cast. On April 28, 1986 the original count date for the election and the date on which all ballots were impounded the NMB was aware of the number of ballots that had been cast in said election. Between that date and its decision on May 13, 1986 the IBT had ex parte communications with representatives of the NMB in an effort to have said contingent flight attendants disenfranchised. TWA Verified Complaint ¶¶ 1, 41, 64 and 65.

4. I have reviewed the affidavit of Charles K. Barnes, Executive Director of the National Mediation Board. Mr. Barnes was not appointed Executive Director until May 4, 1986 and therefore is without personal knowledge as to the vast preponderance of facts relevant to the instant dispute. Consequently, his averments are merely custodial in nature, verifying the official nature of the documents attached thereto. In that regard, as discussed, *infra*, the Barnes affidavit in presenting the alleged relevant documents omits the NMB's initial and key directive on the contingent flight attendant ("CFA") issue. Missing as well are other documents submitted to the Board on the eligibility of the CFAs.

5. On March 24, 1986 the IBT advised the NMB "that passenger service employees of TWA are being used as replacements for striking flight attendants represented by IFFA. Eligibility questions in the ongoing passenger service craft or class election may be raised by this situation, particularly *where permanent replacement status* has been offered." The IBT then requested the Board to direct TWA to produce a list of all passenger service employees working as flight attendants. The IBT March 24 letter is attached hereto as Exhibit A.

6. On April 2, 1986 the NMB by mailgram, received on April 4, 1986, ordered TWA:

> "to furnish the Board a list of all employees presently on the eligibility list and working in another craft or class. *TWA's attention is directed to Section 5.303* of the NMB Representation *Manual* which states '*employees who are working regularly in another craft or class* on the same carrier will be considered *ineligible* to participate in the craft or class involved in the Board representative's investigation.' "

Emphasis supplied. The list was to be furnished to the Board on April 8, 1986. A copy of the NMB mailgram is attached hereto as Exhibit B.

7. On April 8, 1986 TWA responded to the Board's order by reminding the Board that TWA had previously provided a list of employees who, since the cutoff date, had begun regularly working outside the passenger service craft or class. TWA had also orally advised Mediator Anderson that it would continue to update such information along with other instances of ineligibility by reason of voluntary termination, retirement or death.

8. The April 8 submission by TWA, attached hereto as Exhibit C, advised the NMB that:

> *None of the members of the craft or class who are substituting for striking flight attendants have been regularly assigned to these positions within the meaning of Section 5.303.* Additionally, all non-contract employees who have

been assigned to flight or ground crew positions have been reassigned on a contingent, temporary basis during the strike emergency. Many of the contingent flight attendants perform their normal assignments, as well as, additional in-flight assignments. All non-contract employees who temporarily assigned to in-flight duty are being paid their regular salary or the minimum flight attendant's salary, whichever is higher. *See*, Telegram of E.M. Baisden, Director of Compensation to all Payroll Group Managers dated March 19, 1986. As further evidence of the temporary nature of the assignment, please note that some temporarily assigned flight attendants have been returned to their normal positions. It is therefore unnecessary to identify the temporary flight attendants as they are not ineligible under Section 5.303. Excluding such employees as perhaps contemplated by the IBT request would unjustly deprive legitimate craft or class members from exercising the right to express their position in the election.

Clearly, TWA has no legal obligation to identify these temporarily assigned employees. Nevertheless, there is an additional, compelling factor inhibiting the carrier from voluntarily compiling such a list. TWA has reason to believe that such a list would be used by IFFA to harass the strike substitutes. As evidenced by the attached letter of Mr. William Hoar, Vice President of Labor Relations, to Ms. V.L. Frankovich, *the temporary flight attendants have been subject to harassment and abuse by striking flight attendants.* Temporary flight attendants have been contacted at home in an attempt to cajole or coerce them into refusing assignment to flight attendant positions. It is the very strong feeling of TWA that providing a list of temporary flight attendants as requested would be abused by IFFA to further harass these employees. While the carrier wishes to cooperate with the Board in this circumstance, it is not in the interest of the craft or class employees, the carrier nor does it further the purposes of the Act to provide a list which the carrier is not legally obligated to compile.

9. Without commenting on the facts presented by TWA on April 8, the NMB, on April 18, ordered TWA to provide the names of the passenger service employees working in the flight attendant craft or class to Mediator Anderson at the pre-election conference on April 25, 1986. A copy of that telegram is attached hereto as Exhibit D.

10. On April 25, 1986 TWA advised Mediator Anderson and Rowland Watkins that TWA had a list of passenger service employees temporarily working as flight attendants available and had brought the personnel files of all such employees, as well as other records establishing that these passenger service employees were regularly employed passenger service agents only temporarily working in the flight attendant craft or class. I also provided Mediator Anderson with TWA Interoffice Correspondence from Robert F. Allen, Senior Vice President of Employee Relations to various TWA staff members advising them that:

> Some questions have been raised concerning when contingent flight attendants would be returned to their regular assignments. As you know, the noncontract employees who have been assigned flight attendant duties have been assigned on a temporary basis during the strike emergency and many have already returned to their regular jobs. Although it is not possible at this point in time to establish a date for the return of each such employee to regular assignment, it is our intention to return these employees as soon as it is possible to do so. Further we anticipate that we shall be able to commence returning customer service agents and reservations agents to their regular jobs around May 10.

A copy of this memo is attached hereto as Exhibit E.

11. Mediator Anderson ruled on April 25 and again on April 28 that passenger service employees permanently accepted to the flight attendant craft or class were ineligible to vote but that passenger service employees serving as contingent flight attendants were eligible. He advised me on both dates that given his ruling, NMB receipt of the personnel documentation was unnecessary.

12. At the pre-ballot count conference on April 25, 1986 William Genoese, Director National Airline Division of the Teamsters, stated to representatives of the IAM in my presence that he strongly disagreed with the Mediator's decision regarding the contingent flight attendants and that he believed there were "hundreds" of ballots at stake.

13. At the pre-ballot count conference on April 28, I provided Mediator Anderson with a copy of TWA Newsgram # 55 *Flight Attendant Recruitment Has Reached Its Objective; Contingents to Return to Regular Jobs by End of Week.*" The Newsgram announced that TWA's travel college had completed recruitment of permanent flight attendants permitting the carrier to return the remaining contingents "to be . . . at their regular work by the end of this week." A copy of Newsgram #55 is attached hereto as Exhibit F.

14. On April 28, 1986, the parties continued the eligibility review of the list of potential voters begun on April 25. At approximately 3:00 p.m. that day there was a colloquy between Mediator Anderson, Wilma B. Liebman, Esq., counsel for the IBT, and myself concerning ballots for furloughed employees and employees with inaccurate addresses. In response to continued questioning on these subjects by Ms. Liebman and myself, Mr. Anderson stated that "we know what ballots we have" and dismissed concerns about a delayed or inaccurate ballot count.

15. By telegram of April 30, 1986 the NMB, while acknowledging that TWA had identified, as ordered, on April 25 those passenger service employees permanently transferred to the flight attendant craft or class, nevertheless ordered TWA to furnish by May 2, 1986 "the names of all employees on the eligibility list who were *temporarily* working outside the craft or class of passenger service employees on April 28, 1986." A copy of the NMB April 30 telegram is attached hereto as Exhibit G.

16. On or about April 30 and May 2, I had telephone conversations with Mediator Anderson concerning the eligibility of passenger service employees serving as contingent flight attendants. In those conversations, Mr. Anderson repeatedly advised me that the Teamsters were very upset with his decision holding

these employees eligible and that the Teamsters were "pressuring the Board" on this issue. He advised me that he understood that all parties, except the Teamsters, agreed with his decision. He further advised me that I should "do my homework" because it was necessary to "grab the Board's attention on this one." I asked Mr. Anderson if the Teamsters had submitted any evidence establishing that the passenger service employees serving as flight attendants were not doing so temporarily. He told me "you have their submission," referring to the IBT's April 28 letter. That letter was totally unsupported by any facts and did not address the facts presented at the pre-ballot count conferences or set forth in TWA's original statement submitted on April 8, 1986.

17. On May 2, 1986, TWA filed with the NMB its Memorandum Supporting Eligibility Decisions Of The Mediator. While this submission is included in the NMB "file," Government Exhibit 47, excluded are TWA's Exhibits in support. Of particular relevance is that evidence establishing the temporary nature of the contingent flight attendant assignments, namely:

(i) the affidavit of William S. Borden, Vice President of In-Flight Services for TWA (Exhibits A and B to the Borden affidavit had been provided to Mediator Anderson before the May 2nd submission, as discussed *supra*, at ¶¶ 10 and 13, and are attached to this affidavit as Exhibits E and F);

(ii) sample correspondence from passenger service employees serving as contingent flight attendants complaining that they had been refused permanent flight attendant positions.

The Borden Affidavit and the employees' correspondence are attached hereto as Exhibits H and I, respectively.

Further the affiant sayeth not.

/s/ KATHLEEN M. MCKENNA
Kathleen M. McKenna

Sworn to before me this
18th day of November, 1986.

/s/ RENEÉ TERES DAMBAKLY
Notary Public

Renee Teres Dambakly
Notary Public, State of New York
No. 24-4821400
Qualified in Kings County
Commission Expires Sept. 30, 1988

EXHIBIT "A"

WILMA B. LIEBMAN
Attorney at Law

25 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 624-7464

March 24, 1986

Rowland K. Quinn
Executive Director
National Mediation Board
1425 K Street, N.W.
Washington, D.C. 20001

Re: Trans World Airlines
No. R-5610

Dear Mr. Quinn:

It has come to the attention of the International Brotherhood of Teamsters that passenger service employees of TWA are being used as replacements for striking flight attendants represented by IFFA. Eligibility questions in the ongoing passenger service craft or class election may be raised by this situation, particularly where permanent replacement status has been offered. So that we properly may evaluate this issue, we hereby request that the carrier be directed to furnish to the Board forthwith a list of all passenger service craft or class employees now working as flight attendants, with the following information: name, employee number, seniority date, location, craft or class job classification, current employment status, and employment status as of April 28, 1986, the date ballots will be counted.

This information is vital so that the results of the ongoing election will reflect the wishes of craft or class employees only. Thank you for your prompt consideration of this matter.

Very truly yours,

/s/ WILMA B. LIEBMAN
Wilma B. Liebman

WBL:lu

cc: William F. Genoese
William Scheri
V. L. Frankovich
John T. Weise, Esq.

EXHIBIT "B"

[WESTERN UNION MAILGRAM]

NATIONAL MEDIATION BOARD
1425 K St NW
WASHINGTON, DC 20572 02AM

1-0127061092 04/02/86 TWX ESL62153590 CGAA

JOHN T WEISE ESQ
SEYFARTH SHAW FAIRWEATHER & GERALDSON
55 EAST MONROE STREET
CHICAGO IL 60603

W. W. WINPISINGER, INTL PRESIDENT
IAM&AW

WILLIAM SCHERI, AIRLINE COORDINATOR
IAM&AW

WILMA B. LIEBMAN, ESQ
IBT

JOHN GAISER
STAFF VICE PRESIDENT, EMPLOYEE RELATIONS
TRANS WORLD AIRLINES

RICHARD D. PEARSON, PRESIDENT
TWA

RE: NMB CASE NO. R-5610
TRANS WORLD AIRLINES, INC.

ON MARCH 31, 1986, THE NATIONAL MEDIATION BOARD (BOARD) RECEIVED A LETTER FROM THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS (IBT), THE TEXT OF THE LETTER IS AS FOLLOWS:

QUOTE. IT HAS COME TO THE ATTENTION OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS THAT PASSENGER SERVICE EMPLOYEES OF TWA ARE BEING USED AS

REPLACEMENTS FOR STRIKING FLIGHT ATTENDANTS REPRESENTED BY IFFA. ELIGIBILITY QUESTIONS IN THE ONGOING PASSENGER SERVICE CRAFT OR CLASS ELECTION MAY BE RAISED BY THIS SITUATION, PARTICULARLY WHERE PERMANENT REPLACEMENT STATUS HAS BEEN OFFERED, SO THAT WE PROPERLY MAY EVALUATE THIS ISSUE, WE HEREBY REQUEST THAT THE CARRIER BE DIRECTED TO FURNISH TO THE BOARD FORTHWITH A LIST OF ALL PASSENGER SERVICE CRAFT OR CLASS EMPLOYEES NOW WORKING AS FLIGHT ATTENDANTS, WITH THE FOLLOWING INFORMATION: NAME, EMPLOYEE NUMBER, SENIORITY DATE, LOCATION, CRAFT OR CLASS, JOB CLASSIFICATION, CURRENT EMPLOYMENT STATUS, AND EMPLOYMENT STATUS AS OF APRIL 26, 1986, THE DATE BALLOTS WILL BE COUNTED.

THIS INFORMATION IS VITAL SO THAT THE RESULTS OF THE ONGOING ELECTION WILL REFLECT THE WISHES OF CRAFT OR CLASS EMPLOYEES ONLY. THANK YOU FOR YOUR PROMPT CONSIDERATION OF THIS MATTER. END OF QUOTE.

TWA IS HEREBY ORDERED TO FURNISH THE BOARD A LIST OF ALL EMPLOYEES PRESENTLY ON THE ELIGIBILITY LIST AND WORKING IN ANOTHER CRAFT OR CLASS. TWA'S ATTENTION IS DIRECTED TO SECTION 5.303 OF THE NMB REPRESENTATION MANUAL WHICH STATES "EMPLOYEES WHO ARE WORKING REGULARLY IN ANOTHER CRAFT OR CLASS ON THE SAME CARRIER WILL BE CONSIDERED INELIGIBLE TO PARTICIPATE IN THE CRAFT OR CLASS INVOLVED IN THE BOARD REPRESENTATIVE'S INVESTIGATION." THE LIST MUST ALSO CONTAIN THE FOLLOWING INFORMATION: NAME, EMPLOYEE NUMBER,

DUTY STATION OR LOCATION, JOB TITLE AND CURRENT STATUS CODE. THE LIST MUST BE FURNISHED TO THE BOARD BY 3:00 P.M., ON TUESDAY APRIL 8, 1986.

ORIGINAL GAISER. COPIES WEISE, PEARSON, WINPISINGER, SCHERI, GENOESE, LIEBMAN, FRANKOVICH.

ROWLAND K. QUINN, JR.
EXECUTIVE DIRECTOR
NATIONAL MEDIATION BOARD
892710 (RL/AK1555)4/2/86 WED 16:07

16:26 EST

MGMCOMP

EXHIBIT "C"

[LETTERHEAD OF SEYFARTH, SHAW]

April 8, 1986

BY HAND

Mr. Rowland K. Quinn, Jr.
Executive Director
National Mediation Board
1425 K Street, N.W.
Washington, D.C. 20572

Re: Trans World Airlines, Inc.
NMB Case No. R-5610

Dear Mr. Quinn:

This letter is submitted in response to your telegram of April 2, 1986 and the request of the International Brotherhood of Teamsters of March 24, 1986.

TWA has previously provided to the Board, in compliance with Section 5.303 of the NMB Representation Manual, a list of those employees regularly working outside of the craft or class due to transfer or promotion. *See* Appeal of Carrier Position Statement Concerning Clarification Of Craft Or Class at 8 and 9.

None of the members of the craft or class who are substituting for striking flight attendants have been regularly assigned to these positions within the meaning of Section 5.303. Additionally, all noncontract employees who have been assigned to flight or ground crew positions have been reassigned on a contingent, temporary basis during the strike emergency. Many of the contingent flight attendants perform their normal assignments, as well as additional in-flight assignments. All noncontract employees temporarily assigned to in-flight duty are being paid their regular salary or the minimum flight attendant's salary whichever is higher. *See* Telegram of E.M. Baisden, Director of Compensation to all Payroll Group Managers dated March 19, 1986. As further evidence of the temporary nature of

the assignment, please note that some temporarily assigned flight attendants have been returned to their normal positions. It is therefore unnecessary to identify the temporary flight attendants as they are not ineligible under Section 5.303. Excluding such employees as perhaps contemplated by the IBT request would unjustly deprive legitimate craft or class members from exercising the right to express their position in the election.

Clearly, TWA has no legal obligation to identify these temporarily assigned employees. Nevertheless, there is an additional, compelling factor inhibiting the carrier from voluntarily compiling such a list. TWA has reason to believe that such a list would be used by IFFA to harass the strike substitutes. As evidenced by the attached letter of Mr. William Hoar, Vice President of Labor Relations, to Ms. V. L. Frankovich, the temporary flight attendants have been subject to harassment and abuse by striking flight attendants. Temporary flight attendants have been contacted at home in an attempt to cajole or coerce them into refusing assignment to flight attendant positions. It is the very strong feeling of TWA that providing a list of temporary flight attendants as requested would be abused by IFFA to further harass these employees. While the carrier wishes to cooperate with the Board in this circumstance, it is not in the interest of the craft or class employees, the carrier nor does it further the purposes of the Act to provide a list which the carrier is not legally obligated to compile.

Very truly yours,

SEYFARTH, SHAW, FAIRWEATHER & GERALDSON

By JOHN T. WEISE (byam)
John T. Weise

cc: W.W. Winpsinger
William Scheri
V.L. Frankovich
Wilma B. Leibman, Esq.
William F. Genoese
Robert F. Allen
Michael A. Katz, Esq.

ALLNRTW MKCAKTW MKCICTW NYCICTW
.NYCICTW 041459/480717WI
SUBJECT . . . HOLIDAY PAY—NONCONTRACT EMPLOYEES TEMPORARILY ASSIGNED TO IN-FLIGHT DUTY.
ALL AGENT/CLERICAL AND LEVEL O MANAGEMENT EMPLOYEES WHO ARE ACTING AS FLIGHT ATTENDANTS WILL BE PAID AN ADDITIONAL EIGHT HOURS AT TIME AND ONE-HALF IN RECOGNITION OF THE GOOD FRIDAY HOLIDAY. PAYMENT WILL BE MADE REGARDLESS OF WHETHER EMPLOYEE WAS BETWEEN TRIPS/ON FLIGHT DUTY/STANDBY/OR LAYOVER ON MARCH 28/1986. THIS PAYMEMT WILL APPEAR IN FLIGHT PAY CHECKS WHICH WILL BE DISTRIBUTED TO EMPLOYEES ON OR ABOUT APRIL 25/1986. REFER QUESTIONS TO ELEANOR BAISDEN X3343 NYC OR JOHN GAISER X6225 KCAC OR YOUR REGIONAL PERSONNEL OFFICE.
JOHN GAISER/STAFFVP/EMPLOYEE RELATIONS

RT OB8 00149 04/041500

cc: BF
NS
LB
RJ
SC

ALLNRTW MKCAKTW NYCICTW
.NYCICTW 192128/480717WI

ATTN PAYROLL GROUP MANAGERS
SUBJ . . . NON CONTRACT EMPLOYEES TEMPORARILY ASSIGNED TO IN-FLIGHT DUTY.

1. SALARIED EMPLOYEES WHO ARE ACTING AS FLIGHT ATTENDANTS WILL BE PAID AT TIME AND ONE HALF FOR ALL HOURS OVER 65 FLOWN IN A CALENDAR MONTH. THE 65 HOUR FIGURE WILL BE PRORATED FOR MARCH TO REFLECT THE PORTION OF THE MONTH THE EMPLOYEE WAS IN FLIGHT ATTENDANT STATUS.
2. IN ADDITION EMPLOYEES WILL BE PAID $1.50 FOR EACH HOUR AWAY FROM IN-FLIGHT DOMICILE. THIS PAYMENT WILL COVER EMPLOYEE/S OUT OF POCKET EXPENSES INCLUDING MEALS WHILE AWAY FROM ASSIGNED DOMICILE.

. . .

3. PAYMENTS DESCRIBED IN ITEMS 1 AND 2 ABOVE WILL BE MADE BY SEPARATE CHECK NO LATER THAN THE 25TH APRIL FOR FLIGHT DUTY IN MARCH.
4. EMPLOYEES WHO ARE ASSIGNED TO DOMICILES AWAY FROM THEIR NORMAL WORK LOCATION WILL BE PROVIDED WITH HOTEL ACCOMMODATIONS AND WILL BE REIMBURSED FOR REASONABLE AND ACTUAL EXPENSES—INCLUDING FOR EXAMPLE MEALS AND LAUNDRY—THAT ARE INCURRED AT THEIR ASSIGNED DOMICILE. THESE EXPENSES MUST BE REPORTED MONTHLY ON FORM G-118 EXPENSE REPORT AND SHOULD REFLECT THE EMPLOYEES OWN COST CENTER AND LOCATION. COMPLETED EXPENSE REPORTS ARE TO BE FORWARDED . . . TO DIANE CROLL/ DIRECTOR FLIGHT ATTENDANT ADMINISTRATION/605 THIRD AVE./NYC/FOR VERIFICATION AND FURTHER HANDLING.

5. ALL TRAVEL ADVANCES MUST ALSO BE CLEARED ON FORM G-118 EXPENSE REPORT. SUGGEST THAT NEAREST IN-FLIGHT DOMICILE SUPPLY APPROPRIATE HOTELS WITH A SUPPLY OF EXPENSE REPORT FORMS.
6. AS A REMINDER/THE MINIMUM SALARY FOR TEMPORARY FLIGHT ATTENDANT DUTY IS $1007.50 PER MONTH. SALARIED EMPLOYEES WILL BE PAID THEIR REGULAR SALARY OR THE MINIMUM SALARY/WHICHEVER IS HIGHER. REGULAR PART-TIME SALARIED EMPLOYEES WILL BE PAID AN EQUIVALENT FULL-TIME SALARY BASED ON THEIR REGULAR HOURLY RATE OR THE MINIMUM OF $1007.50—WHICHEVER IS HIGHER.

ELEANOR M. BAISDEN
DIRECTOR-COMPENSATION

RT OB8 00199 03/192130

[LETTERHEAD OF TWA]

HAND DELIVERED

April 1, 1986

Ms. Victoria Frankovich
President
Independent Federation of
Flight Attendants
630 Third Avenue
New York, NY 10017

Dear Ms. Frankovich:

Your March 17, 1986 letter asks TWA to provide IFFA with ten categories of information, which you say you require "in order that IFFA be able to carry out its statutory duties and responsibilities, including but not limited to the negotiation of a new labor agreement."

We acknowledge that because of IFFA's status as the certified representative of TWA employees in the flight attendant craft or class, and TWA's and IFFA's obligation, under RLA Section 2 First, to continue to exert every reasonable effort to reach agreement, IFFA is entitled to receive some of the requested information, if available. On that basis, we respond, as follows to the numbered paragraphs of your letter:

1. No flight attendants were hired into positions in the flight attendant craft or class between February 15 and midnight March 6, 1986. On and after March 7, more than 1800 individuals have been hired to fill positions in that craft or class. As of March 30, 1986, new-hire flight attendants were assigned to the following domiciles:

BOS	— 94	ORD	— 71
NYC	— 456	SFO	— 126
LAX	— 288	STL	— 597

In light of reported and documented incidents of harassment of TWA personnel now working as flight attendants, including direct and telephoned threats of bodily harm, TWA will not make available the names, addresses of telephone numbers of any individual, as requested in paragraph 1 of your letter.

The expired agreement nowhere provided for the furnishing of telephone numbers, and IFFA's present request for telephone numbers is suspect in light of evidence of abusive phone calls by anonymous union supporters. TWA recognizes no obligation to provide IFFA with telephone numbers, and certainly will not do so under existing circumstances.

Although we are unwilling, in light of the ongoing strike and evidence of harassment of individual TWA employees, to provide IFFA with the names or addresses of new-hire flight attendants, we will, if you request, put a notice of flight attendant bulletin boards informing such employees of IFFA's desire to communicate with them, and of the appropriate means (place, telephone number, etc.) to respond to IFFA, if they wish to do so. Any individual employee electing to furnish IFFA with his/her name, address and telephone number and/or meet with IFFA representatives is, of course, entirely free to do so.

We believe our offer is consistent with IFFA's desire for a viable means of access to employees in the flight attendant craft or class, with TWA's obligation to its employees not to expose them unnecessarily to harassment, and with TWA's right to continue flight operations notwithstanding the disruption, legal and illegal, caused by the ongoing strike.

2. No TWA employees other than flight attendants represented by IFFA were assigned to fill flight attendant positions prior to March 7, 1986. Your letter does not explain on what theory IFFA's performance of its representation duties or negotiation of new contract terms supports your request for information as to the names, addresses and telephone numbers of TWA employees who are not represented by IFFA, and who have been temporarily assigned to perform flight attendant duties since March 7, 1986.

As you know, such temporary assignments do not affect the right of striking flight attendants to return to such vacancies as

may exist at the time they make an unconditional offer to return, including vacancies which may at the time be filled by temporarily assigned personnel. Those temporary assignments, accordingly, are irrelevant to the "existing and ongoing employer-employee relationship," identified by your letter as an alternate basis for your information request. Threats to TWA employees who have crossed or worked behind IFFA's picket lines would make TWA unwilling, in any event, to furnish the names, addresses and telephone numbers of any such employees.

TWA employees not represented by IFFA have been performing in-flight service duties on a regular basis since March 7, 1986. This contingent work force has been assigned and reassigned on an operational requirement basis, and has been used to staff in-flight service operations at all domiciles. TWA is continuing to hire additional flight attendants as permanent replacements, which will permit temporarily assigned TWA employees to return to their regular classifications and responsibilities.

3. Our response to your request for names, addresses and telephone numbers of foreign nationals who have been hired or assigned to fill flight attendant positions since March 7, 1986 is included within our response to your paragraphs 1 and 2.

Any foreign nationals hired as flight attendants by TWA since March 7 possess green cards authorizing them to work within the United States. They are subject to the same rates of pay as other new-hire flight attendants, and to the rules and working conditions applicable to all flight attendants currently on TWA's payroll. TWA does not maintain a breakdown of new-hire flight attendants by nationality.

The contingent work force described in paragraph 2 above includes some foreign nationals based overseas, who have been temporarily assigned to perform flight attendant duties on flights beginning and terminating overseas. Like all members of the contingent work force, they are being paid at new-hire flight attendant rates or at their regular rate of pay, whichever is higher. They are subject to the same work rules as all TWA employees performing flight attendant duties during the strike.

4. For reasons already stated, TWA will not provide names, addresses or telephone numbers for new-hire flight attendants, or identify by name flight attendants employed by TWA prior to March 6, 1986, who have worked since March 7. TWA accordingly declines to furnish such information in response to IFFA's request for information as to flight attendant transfers or reassignments. We can and will provide you with data as to transfers and reassignments of employees in the flight attendant craft or class, without identifying affected individuals by name.

As you know, all flight attendants were notified by a Special Information Bulletin, dated March 9, 1986, that transfers to fill known vacancies would be announced on March 13, 1986, and that transfers would be based on requests from working flight attendants, received by close of business on March 12, 1986. Copies of the Bulletin were posted on all flight attendant bulletin boards on March 9, and sent by mailgram to the home addresses of all flight attendants on the system seniority list, without regard to whether they were working. An additional copy is enclosed as Attachment 1 to this letter.

Effective March 13, 1986, in accordance with the March 9 Bulletin, working flight attendants on the payroll prior to March 7, 1986 were transferred to the following domiciles and classifications:

*Transfers to Flight Service Manager Positions**

To		From					
BOS	1	JFK	(1)				
ORD	2	JFK	(1);	ORD (1)			
NYC	1	JFK	(1)				
STL	18	JFK	(4);	NYD-FSM	(1);	STL (13)	
LAX	7	JFK	(4);	NYD-FSM	(2);	STL-FSM (1)	
SFO	4	SFO	(1);	STL-FSM	(1);	JFK (1);	STL (1)
	33						

* Except as noted, all transfers are from cabin attendant positions.

Transfers to Cabin Attendant Positions

To		From		
BOS	0	O		
ORD	1	JFK	(1)	
LAX	17	JFK	(6);	STL (11)
NYC	1	STL	(1)	
STL	15	JFK	(12);	MCI (1); JFK-FSM (1); SFO (1)
SFO	7	JFK	(2);	STL (5)
	41			

New hire flight attendants were reassigned, as follows:

To		From		
BOS	31	JFK	(25);	STL (6)
ORD	41	STL	(31);	JFK (10)
NYC	5	STL	(5)	
STL	31	JFK	(31)	
LAX	199	JFK	(114);	STL (85)
SFO	68	STL	(27);	JFK (41)
	375			

Additional transfers and reassignments were made on March 20, 1986, as follows:

Transfers to Flight Service Manager Positions

To		From				
BOS	1	BOS	(1)			
ORD	1	ORD	(1)			
NYC	8	JFK	(8)			
STL	15	STL	(11);	MCI (2);	JFK-FSM (1);	SFO (1)
LAX	8	LAX	(4);	STL (3);	JFK (1)	
SFO	1	JFK	(1)			
	34					

Transfers to Cabin Attendant Positions

To		From			
BOS	0	0			
ORD	0	0			
NYC	3	STL	(2);	MCI (1)	
STL	11	JFK	(8);	MCI (2);	LAX-D (1)
LAX	16	STL	(6);	JFK (10)	
SFO	5	STL	(4);	JFK (1)	
	35				

New hire flight attendants were reassigned as follows:

To		From			
BOS	40	STL	(5);	JFK (35)	
ORD	19	STL	(10);	JFK (9)	
NYC	2	STL	(2)		
STL	24	JFK	(24)		
LAX	104	STL	(27);	JFK (77)	
SFO	59	STL	(8);	BOS (1);	JFK (50)
	348				

As further described below, thirteen cabin attendants assigned to the Kansas City domicile were reassigned to St. Louis, effective April 1, 1986.

We will not provide the actual transfer messages, as requested in your letter. As you know, those messages consist almost entirely of flight attendant names and other identifying data. Deletion of identifying information would be a time consuming operation, and render the documents themselves meaningless.

5. Former TWA flight attendants referred to in your letter as "clipped wings," employed as temporary supervisors, have been performing flight attendant duties, among other duties, since March 7, 1986. Your letter suggests no basis on which IFFA would be entitled to the names, addresses and phone numbers of temporary supervisors, and TWA acknowledges no obligation to deliver that information to IFFA under any circumstances. TWA certainly has no such obligation in light of

the evidence of harassment and threats to TWA employees performing flight attendant duties.

6. As shown in the bid package for April 1986 (Attachment 2 to this letter), TWA plans to operate Kansas City as a satellite to the St. Louis domicile, effective April 1, 1986. On March 5, 1986, just prior to the strike, only 150 flight attendants were assigned to the Kansas City domicile, and the March 1988 Kansas City bid package listed 98 bid lines, compared to 928 bid lines for the St. Louis domicile.

Although your March 17, 1986 letter refers to "[r]ecent news stories" as the source of your information about TWA's intentions with respect to closing of domiciles, on March 9, 1986, a Special Information Bulletin on that subject was sent to the homes of all TWA flight attendants, including all of IFFA's officers (Attachment 1). It contained a notice that

> "THE FOLLOWING DOMICILES ARE LIKELY TO BE CLOSED AND DESIGNATED AS SATELLITES-SFO-MCI-ORD AND BOS SFO WILL LIKELY SERVE AS A SATELLITE OF LAX AND MCI AND ORD AS A SATELLITE OF STL WITH BOS AS A SATELLITE OF JFK."

A Special Information Bulletin, posted on all flight attendant bulletin boards on March 13, 1986, moreover, notified working flight attendants that the Kansas City domicile would be closed, effective April 1, 1986, and that Kansas City would be designated as a satellite to St. Louis for the month of April and was expected to be so designated thereafter. A copy of the March 13, 1986 Bulletin is enclosed as Attachment 3. As a result of the implementation of TWA's satellite proposal, and designation of Kansas City as a satellite of St. Louis, TWA will maintain a single reserve pool covering St. Louis and Kansas City.

The working flight attendants then assigned to the Kansas City domicile (fourteen altogether) were given the option of reassignment to the St. Louis domicile (where they will be eligible to bid for lines of time assigned either to the St. Louis or the Kansas City operations, or of requesting reassignment to a va-

cancy at another domicile, effective April 1, 1986. Thirteen elected reassignment to the St. Louis domicile.

TWA is continuing to evaluate designating other domiciles as satellite operations, including those identified in the March 9 Information Bulletin. Since you have now requested specific information about the intentions we expressed in our March 9 Bulletin, we will discuss ongoing evaluations with you, at your request.

7. The changes in flight attendant rates of pay, rules and working conditions, and their effective dates were described in a March 7, 1986 posting at all flight attendant domiciles. A copy of the posting was delivered to your office on that date, but I enclose an additional copy (Attachment 4). The new work rules are reflected in the April 1986 bid package, issued March 18, 1986, which is also enclosed (Attachment 2).

We have recently prepared a more complete statement of the new rates of pay and work rules for distribution to all working flight attendants, and append a copy hereto as Attachment 5. We have also implemented, effective March 7, 1986, TWA's proposals with respect to Article 16(A)(3)(a) and 16(B) (furnishing of on-property office space and salaries for full time IFFA representatives), and Article 31 (dues check-off)

8. As you must be aware, the flight schedules for March 1986, as contained in the pre-strike March bid package, were of no further effect after midnight March 6. Since that time, the airline has adopted flight schedules on an ad hoc basis as we have worked to restore full service to the flying public. The April 1986 bid package is based on implementation of TWA's work rule proposals, including changes in required rest and a flexible monthly cap.

As you know, the automated "F/A Schedules for Bid Month, JD 45001," reporting actual hours of service for the month of March, will not be available until mid-April. In the event no new agreement has been reached by that time, we will deliver the report to you, with names eliminated for March 7 and thereafter. We do not acknowledge any obligation to make investigations or generate special reports at IFFA's request,

particularly in light of the unusual administrative burdens imposed on TWA by the strike by its flight attendants.

9. TWA has received no reports of any alleged safety violation and/or violation of FAA rules and regulations, except for a request by the FAA for information with respect to the completion by TWA flight attendants of the initial Operating Experience required by the provisions of TWA's FAA approved training program to meet the requirements of FAR 121.4341(c). The request, dated March 17, 1986, which we believe to be based on allegations by IFFA of non-compliance with training requirements, does not identify any particular flights, dates of alleged violations, or the nature of the alleged violations.

Flight attendants hired and assigned to active duty since March 7, 1986, and TWA employees temporarily assigned to perform flight attendant duties since that date, had completed the same safety training procedures that TWA flight attendants have completed for over 25 years, with the approval of the FAA Regional Office in Kansas City. Effective April 1, 1986, TWA has revised its historical procedures to provide new flight attendants and TWA employees newly assigned to perform flight attendant duties with 2.5 hours of supervised flying in revenue service. Flight attendants completing supervised training on such flights will be over and above the FAA minimum crew complement.

Recently hired flight attendants have received 18 days of flight attendant training, compared to the 25 days received, for example, by flight attendants trained and hired in 1985. The reduction in total training days was entirely in service and grooming training; there has been no reduction in the time spent in safety training.

We are confident that there has been no deterioration in the safety of TWA's operations as a result of the flight attendant strike.

10. As of this time, TWA has no available information or documentation reflecting experience with its implemented changes in a non-strike situation. Since March 7, 1986, TWA has been operating a steadily increasing scheduled service. We reached 100% of pre-strike scheduled service on March 30,

1986, in accordance with the Operational Performance Summary prepared by TWA Scheduling on March 24, 1986 (Attachment 6).

Flight attendant utilization to date reflects maximum utilization without advance scheduling, and temporary adjustments to strike-created exigencies. TWA's costs have been increased by the need for round-the-clock security, strike command posts, and other strike-related costs. Operations under the April bid package will furnish some information and documentation as to costs and savings under the new rates of pay and rules. April scheduling and operations will, however, reflect strike-related adjustments, and unless the strike is settled, an atypical work force in terms of rates of pay and job classification.

We understand that your request is for information on an "ongoing and updated basis." We will furnish you with information as to costs and savings that is not atypical for normal operations, to the extent that it is relevant to our negotiations, as it becomes available to TWA.

Very truly yours,

/s/ J. W. HOAR

J. W. Hoar
Vice President
Labor Relations

Enclosures

EXHIBIT "D"

NYCICTW NYCIRTW NYCGNTW JFKXTTW
.JFKXTTW 212003/320120TW

RE-TRANSMISSION OF MSGE SENT YOU ON FRIDAY APR 18 1986 FROM NATIONAL MEDIATION BOARD

W.W. WINPISINGER INTL PRESIDENT IAM/AW
WILLIAM SCHERI AIRLINE COORDINATOR IAM/AW
WILMA B. LIEBMAN ESQ IBT
JOHN GAISER STAFF VP/EMPLOYEE RELS TWA

RE NMB CASE NO. R-5610
TRANSWORLD AIRLINES

THIS TELEX IS BEING RESENT BECAUSE OF TRANSMISSION ERROR.

ON APRIL 2 1986 THE NATIONAL MEDIATION BOARD—BOARD—ORDERED TRANS WORLD AIRLINES INC.—TWA—TO FURNISH THE BOARD A LIST OF ALL EMPLOYEES PRESENTLY ON THE ELIGIBILITY LIST AND WORKING IN ANOTHER CRAFT OR CLASS. THIS TELEX IS A CLARIFICATION OF THAT REQUEST. THE INFORMATION ORDERED BY THE BOARD IS NECESSARY FOR THE BOARD TO COMPLY WITH SECTION 2 NINTH OF THE RAILWAY LABOR ACT WHICH REQUIRES THE BOARD TO DESIGNATE WHO MAY PARTICIPATE ARS ELIGIBLE VOTERS IN REPRESENTATION ELECTIONS. IN A LETTER DATED APRIL 8 1986 TWA CONFIRMED THAT PASSENGER SERVICE EMPLOYEES ARE PRESENTLY WORKING AS FLIGHT ATTENDANTS.

TWA IS HEREBY ORDERED TO FURNISH THE INFORMATION TO BOARD REPRESENTATIVE JOSEPH ANDERSON ON APRIL 25 1986 AT 10.00 A.M.

ORIGINAL GAISER COPIES WINPISINGER GENOESE FRANKOVICH WEISE LIEBMAN AND SCHERI

ROWLAND K. QUINN JR.
EXECUTIVE DIRECTOR
NATIONAL MEDIATION BOARD

TLX 892710—RLCW1550 4/18/86 FRI 16.38

OB8 00248 04/212003

EXHIBIT "E"

[LETTERHEAD OF TWA]

TO:	M. A. Buckstein	FROM:	Senior Vice President -	COPIES:
ADDRESS:	M. Ehrlich	ADDRESS:	Employee Relations	D. J. Corr R. D. Pearson
CITY:	L. L. Hilliard W. J. Hoar R. J. Kenney J. M. Kennedy J. M. Liebman P. T. McHugh M. S. Mulvany J. Nichols R. K. Punwani	CITY: DATE	April 23, 1986	

Some questions have been raised concerning when contingent flight attendants would be returned to their regular assignments. As you know, the noncontract employees who have been assigned flight attendant duties have been assigned on a temporary basis during the strike emergency and many have already returned to their regular jobs. Although it is not possible at this point in time to establish a date for the return of each such employee to regular assignment, it is our intention to return these employees as soon as it is possible to do so. Further we anticipate that we shall be able to commence returning customer service agents and reservations agents to their regular jobs around May 10.

As more information becomes available I shall advise you.

/s/ ROBERT F. ALLEN
Robert F. Allen

EXHIBIT "F"

[LETTERHEAD OF TWA'S NEWSGRAM]

FLIGHT ATTENDANT RECRUITMENT HAS REACHED ITS OBJECTIVE; CONTINGENTS TO RETURN TO REGULAR JOBS BY END OF WEEK

TWA announced today that its travel college has ended its recruitment of flight attendant trainees until further notice, because it now has a sufficient number of applicants and the program has therefore attained its objective.

The continuing graduation of new hire trainees has already released a large number of contingent flight attendants to return to their usual jobs in TWA, and the company expects the majority of them to be at their regular work by the end of this week.

No further talks have been scheduled with IFFA.

April 28, 1986

This is Newsgram #55. When posting, please do not remove previous Newsgram.

EXHIBIT "G"

RCA APR 30 05144
SEYFARTH CGO

6-20151 8A

IS THAY SEYFARTH NEW YORK
+
SEYFARTH CGO

EASYLINK 5685157A001 30APR86 09:48/09:48 EST
FROM: 62153590
NATIONAL MEDIATION BOARD
TO: 25222

JOHN T WEISE ESQ
SEYFARTH SHAW FAIRWEATHER & GERALDSON

W. W. WINPISINGER, INTL PRESIDENT
IAM&AW

WILLIAM SCHERI, AIRLINE COORDINATOR
IAM&AW

WILMA B. LIEBMAN, ESQ.
IBT

JOHN GAISER
STAFF VICE PRESIDENT, EMPLOYEE RELATIONS
TRANS WORLD AIRLINES

RE: NMB CASE R-5610, TRANS WORLD AIRLINES

ON APRIL 2, 1986, THE NATIONAL MEDIATION BOARD (BOARD) ORDERED TRANS WORLD AIRLINES (TWA) TO FURNISH THE BOARD A LIST OF ALL EMPLOYEES PRESENTLY ON THE ELIGIBILITY LIST AND WORKING IN ANOTHER CRAFT OR CLASS. IN ANOTHER TELEX, DATED APRIL 18, 1986 (RESENT ON APRIL 21, 1986 BECAUSE OF TRANSMISSION ERROR), TWA WAS ORDERED TO FURNISH THE INFORMATION TO BOARD REPRESENTATIVE JOSEPH ANDERSON ON APRIL 25, 1986. TWA, ON APRIL 25, 1986, FURNISHED

BOARD REPRESENTATIVE ANDERSON THE NAMES OF THOSE EMPLOYEES "PERMANENTLY TRANSFERRED TO THE FLIGHT ATTENDANTS" CRAFT OR CLASS. TWA IS HEREBY ORDERED TO FURNISH THE BOARD THE NAMES OF ALL THE EMPLOYEES ON THE ELIGIBILITY LIST WHO WERE TEMPORARILY WORKING OUTSIDE THE CRAFT OR CLASS OF PASSENGER SERVICE EMPLOYEES ON APRIL 28, 1986. AS THE BOARD STATED EARLIER, THIS INFORMATION IS VITAL FOR THE BOARD TO COMPLY WITH SECTION 2, NINTH, OF THE RAILWAY LABOR ACT WHICH REQUIRES THE BOARD TO DESIGNATE WHO MAY PARTICIPATE AS ELIGIBLE VOTERS IN REPRESENTATION ELECTIONS, THIS INFORMATION SHOULD BE SUBMITTED IN WRITING TO THE BOARD NO LATER THAN 5:00 P.M., FRIDAY, MAY 2, 1986. ORIGINAL GAISER. COPIES WINPISINGER, GENOESE, FRANKOVICH, WEISE, LIEBMAN AND SCHERI.

ROWLAND K. QUINN, JR., EXEC DIR. NATIONAL MEDIATION BOARD TLX 89-2710 (RL/AK1036) 4/30/86 WED 10:42

EXHIBIT "H"

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

WILLIAM S. BORDEN, being duly sworn, deposes and says:

1. I am Vice-President of In-Flight Services for Transworld Airlines ("TWA"). In that capacity, I am responsible for and knowledgeable about matters relating to TWA's in-flight operations system-wide, including the servicing of flights since the Independent Federation of Flight Attendants ("IFFA") struck on March 7, 1986.

2. All TWA personnel, including passenger service employees, who have served as flight attendants since March 7, 1986 were advised by TWA management prior to assuming their assignments that these positions are temporary and that they would be returned to their regular work assignments as soon as possible. This same directive was communicated to all TWA managers whose employees were temporarily assigned flight attendant positions. Because these flight attendant assignments were expressly made temporary, all persons so assigned are referred to as "contingent flight attendants".

3. TWA has not altered the status of any contingent flight attendants, as reflected on such persons' employment records, by virtue of their service in contingent flight attendant positions. The job titles of persons serving as contingent flight attendants reflect their regular positions. Furthermore, contingent flight attendants have continued to receive their regular position pay rates, except when the flight attendant position to which they have been assigned has a greater rate of pay.

4. When the number of contingent flight attendants was at its maximum, approximately twelve hundred (1200), three hundred thirty-nine (339) passenger service employees were working as contingent flight attendants.

5. On April 23, 1986, TWA management announced that it planned to release all contingent flight attendants to their regular assignments as soon as possible, and anticipated doing so by May 10, 1986. This announcement is annexed hereto as Exhibit A.

6. On April 28, 1986, TWA management announced that because its flight attendants requirements had been fulfilled, the majority of contingent flight attendants would be released to their regular assignments by today, May 2, 1986. This announcement is annexed hereto as Exhibit B.

7. TWA management was able to release a majority of contingent flight attendants on April 30, two days earlier than expected. As of today, every contingent flight attendant in the domiciles of Los Angeles, San Francisco, St. Louis, Boston, and Chicago has been released to his or her regular position. Presently there are approximately five hundred (500) remaining contingent flight attendants. Fewer than half of the three hundred thirty-nine passenger service employees serving as contingent flight attendants remain in that capacity. Remaining contingent flight attendants will continue to be released to their regular positions daily as striking flight attendants return to work and the remaining trainees are released for regular duty.

8. Although contingent flight attendants have been eligible to transfer to regular full-time flight attendant positions if their applications are accepted, only twenty-six (26) such persons (or 2.1% of all contingent flight attendants) have successfully transferred. Several psssenger service employees who applied for transfer to permanent flight attendant positions were refused such assignment. In any event, no further applications from contingent flight attendants for transfer to permanent positions will be entertained.

9. For the duration of the strike, contingent flight attendants, including those who regularly serve in a passenger service capacity, have been subjected to a pattern of harassment and coercion. Reports from throughout the country corroborate this fact.

I declare under penalty of perjury that the foregoing is true and accurate and was executed in Manhattan, New York on May 2, 1986.

/s/ WILLIAM S. BORDEN
William S. Borden

Sworn before me this
2nd day of May, 1986.

/s/ JEDD MENDELSON
Notary Public

Jedd Mendelson
Notary Public, State of New York
No. 4796864
Qualified in New York County
Commission Expires March 30, 1987

EXHIBIT "I"

[LETTERHEAD OF TWA]

3/26/86

Dear Mr. Allen,

I am enclosing this memo to outline my recent activity with TWA and to emphasize my total disagreement and dissatisfaction with Mr. Gianotti's decision not to consider me for a flight attendant position, nearly thirteen weeks after my initial interview and seven days after my involvement as a contingent flight attendant.

Name: Gregory Sanchez
PRN: 73843
Company Seniority: 841203
Initial Interview: Third week of December 1985
Current Height and Weight: 5'11" 170 lbs. (loss of 19 lbs.)
Current Position: Agent in Charge, New Hire Program
References: (While involved with inflight)

William K. Wivchar, Supervisor-Inflight Cabin
Systems and Services (212) 692-3192
George Gerrish, Manager-Flight Attendants
(718) 995-3912
Jenny DeLuna, Clipped Winger (816) 333-9000-B
(816) 241-3082
Thomas Conway, Eastern Regional Manager, Cargo
(718) 244-2589
Arlene Glantz, Current Inflight Recruiter KCAC

Thank you for your consideration of this matter and I trust I shall hear from you shortly.

Sincerely,

/s/ GREGORY SANCHEZ
Gregory Sanchez

[LETTERHEAD OF TWA]

March 13, 1986

Gregory Sanchez
228 Etna St.
Brooklyn NY 11238

Dear Gregory:

TWA's Recruiting Teams have been screening and interviewing thousands of candidates each week for the past several months. It is because of this that TWA has to be extremely selective in its Flight Attendant Recruitment.

Based upon your 288 and your group interview the decision not to consider you further for the Flight Attendant position was a difficult one. There is no easy way to explain this decision other than to reemphasize TWA's need to apply the same criteria fairly and honestly to each applicant. In so doing we still find many qualified applicants. From these, TWA must identify those candidates close to the ideal Flight Attendant profile.

Please know that we understand how this letter is a disappointment to you. Hopefully you will allow it to fuel future career efforts within TWA.

On behalf of the entire inflight Services Recruiting Staff, I'd like to thank you for your interest in the Flight Attendant position and your dedication to TWA.

Sincerely,

/s/ STEPHEN GIANOTTI
Stephen Gianotti, Supervisor
Flight Attendant Recruitment

SG/rjl

EMPLOYEE RESUME AND PERFORMANCE EVALUATION

PERSONAL

EMPLOYEE NAME		DEPARTMENT
GREGORY SANCHEZ		TRAINING
REGISTER NUMBER	COMPANY SENIORITY DATE	LOCATION
073843	841203	NYC RESERVATIONS

TWA EXPERIENCE (Current position first)

POSITION: ACTING AIC	SUPERVISOR: KATHY RANDAZZO	DUTIES: assist supervisor,instruct and monitor new hire agents,represent TWA during employment interviews
PERIOD WORKED (MONTH/YEAR): FROM 1/86 TO present	LOCATION: NYC Reservations	
POSITION:	SUPERVISOR:	DUTIES: AIC capacity:interpret and instruct agents on fares and DRS rules,handle irate passengers and travel agency
PERIOD WORKED (MONTH/YEAR): FROM TO	LOCATION:	
POSITION:	SUPERVISOR:	DUTIES: related problems
PERIOD WORKED (MONTH/YEAR): FROM TO	LOCATION:	
POSITION: Reservations sales ag	SUPERVISOR: DOTTIE O'LEARY	DUTIES: Telephone sales of TWA service and related duties
PERIOD WORKED (MONTH/YEAR): FROM TO	LOCATION:	

WORK EXPERIENCE OTHER THAN TWA (Most recent first)

POSITION: Sales &Service rep	COMPANY: Stratocom	DUTIES: Outside sales and service of Minolta and Canon office equipment and training employees
PERIOD WORKED (MONTH/YEAR): FROM 3/84 TO 11/84	LOCATION: New York,N.Y.	
POSITION: Sales &service rep	COMPANY: Unicom Business	DUTIES: Outside sales and service of Minolta,Canon and Sharp office equipment
PERIOD WORKED (MONTH/YEAR): FROM 1/82 TO 2/84	LOCATION: Albany,N.Y.	
POSITION:	COMPANY:	DUTIES:
PERIOD WORKED (MONTH/YEAR): FROM TO	LOCATION:	

EDUCATION

	NAME	LOCATION	YEARS COMPLETED	DEGREE RECEIVED
HIGH SCHOOL	Bethlehem Central	Delmar,N.Y.	4	Diploma
COLLEGE	Florida Inst. of Tech.	Melbourne,FL.	1	None
GRADUATE/DEGREE COURSES				
TRADE SCHOOLS/ SPECIAL COURSES				

REMARKS (Note any additional experience, skills, or other important background information)

BEST AVAILABLE COPY

BEST AVAILABLE COPY

SCALE FOR SUPERVISOR'S EVALUATION

UNSATISFACTORY	FAIR	AVERAGE	ABOVE AVERAGE	EXCELLENT
Performance is below standards and unacceptable. Immediate need for substantial improvement.	Performance is marginal. Minimum requirements and standards are just met. There is definite need for improvement.	Performance in this area is fully satisfactory.	Performance in this area is above normal job requirements.	Performance in this area consistently exceeds normal job requirements. Requirements and standards are accomplished at the highest possible level.

EVALUATION

CHARACTERISTICS	RATING (Check One)					REMARKS ALL RATINGS MUST BE EXPLAINED.
	UNSATISFACTORY	FAIR	AVERAGE	ABOVE AVERAGE	EXCELLENT	
QUANTITY Volume of work in relation to accomplishing work schedules / established standards.					✓	Very good organizational skills. Is able to answer all questions presented by PSGB staff
QUALITY Accuracy, neatness, thoroughness, organization.					✓	Grey scored highs 90's on all JOB Knowledge tests
TECHNICAL SKILLS / JOB KNOWLEDGE Possesses technical skills and job knowledge to perform present job assignment and responsibilities.					✓	Grey is aware of both teams & company goals & motivates team towards those goals. Grey is able to "think on his feet" and is a effective leader // determines priorities has good common sense
TEAMWORK Helps build team effectiveness and contributes to the goals and objectives.					✓	
INITIATIVE Contributes new ideas and takes the initiative. Leads when given the opportunity.				✓		
PROBLEM SOLVING Demonstrates ability to learn, think, analyze and determine priorities; common sense.				✓		
DEPENDABILITY / RELIABILITY Completes assigned tasks in a timely fashion and follows instructions.				✓		Completes all assigned projects in timely manner. Has no problems adopting to the ever changing environment in Re
FLEXIBILITY Adapts and responds to changing situations and working conditions.				✓		Is able to communicate clearly at all levels of peers &
COMMUNICATION SKILLS Possesses good oral and written skills with customers, peers and management				✓		Grey has an excellent reputation in - he is known
INTERPERSONAL SKILLS Neutral, considerate, courteous, works well with others, responds to another's point of view.				✓		to be caring helpful and
OVERALL EVALUATION Consider all of the above characteristics.					✓	the an excellent listener

SUPERVISOR'S COMMENTS

Make any other remarks which are relevant to this evaluation, including appearance standard for front-line employees.

Greg performs his job in a professional & natural manner. His positive attitude is an asset to both the Reno office and the Compa

SUPERVISOR'S SIGNATURE: [illegible]

EMPLOYEE'S SIGNATURE

190a

Mr. J. Krause
Trans World Airlines
Two Pennsylvania Plaza
New York, New York 10001

March 26, 1986

Dear Mr. Krause:

As per our discussion on March 24, 1986, I am enclosing a copy of the letter I received from Inflight Recruiting.
As you know, I am still very much interested in applying for a permanent flight attendant position.

These last few weeks as a contingent flight attendant have made me all the more certain that I am suited to this line of employment.

I was first interviewed on December 11, 1985 at the JFK Hilton Hotel. At that time, a group screening was held consisting largely of TWA employees.

I would very much welcome a second chance to discuss my abilities, and to display my enthusiasm.

Thank you for your time and consideration.

/s/ MADELEINE GARDELLA
Madeleine Gardella

[LETTERHEAD OF TWA]

March 13, 1986

Madeleine Gardella
10 Cheever Place
Brooklyn NY 11231

Dear Madeline:

TWA's Recruiting Teams have been screening and interviewing thousands of candidates each week for the past several months. It is because of this that TWA has to be extremely selective in its Flight Attendant Recruitment.

Based upon your 288 and your group interview the decision not to consider you further for the Flight Attendant position was a difficult one. There is no easy way to explain this decision other than to reemphasize TWA's need to apply the same criteria fairly and honestly to each applicant. In so doing we still find many qualified applicants. From these, TWA must identify those candidates close to the ideal Flight Attendant profile.

Please know that we understand how this letter is a disappointment to you. Hopefully you will allow it to fuel future career efforts within TWA.

On behalf of the entire Inflight Services Recruiting Staff, I'd like to thank you for your interest in the Flight Attendant position and your dedication to TWA.

Sincerely,

/s/ STEPHEN GIANOTTI
Stephen Gianotti, Supervisor
Flight Attendant Recruitment

SG/rjl

April 1, 1986

Mr. John M. Krause
Director Reservations
2 Penn Plaza
New York, NY 10121

Dear Mr. Krause:

Per our conversation, I am requesting the opportunity to re-apply for the position of Permanent TWA Flight Attendant, before July 23rd 1986.

I am currently working as a Contingent Flight Attendant and have successfully completed the entire TWA Flight Attendant training program.

Your prompt attention to this matter will be greatly appreciated.

Sincerely,

/s/ MIRIAM LUNA
Miriam Luna
PRN 75057

Mr. John Krause, Director
Reservation Sales
Trans World Airlines
New York, New York 10121

March 26, 1986

Dear Mr. Krause:

My name is Linda Baptiste. I am a Reservation Sales Agent presently detailed to the Contingent Flight Attendant Program. In regard to our conversation of March 24, 1986, I am enclosing a copy of the letter I received from Inflight Recruiting. I was first interviewed on December 11, 1985 at the JFK Airport Hilton. Since that time my on the job experience combined with my safety training have only strengthened my desire to pursue a career as a flight attendant.

Mr. Krause, I have not only enjoyed working directly with the public, but feel I have also benefited from representing TWA in a front line position.

Your attention and interest in this matter is much appreciated.

/s/ LINDA BAPTISTE
Linda Baptiste

[LETTERHEAD OF TWA]

February 3, 1986

Linda Baptiste
725 Euclid Ave.
Brooklyn NY 11208

Dear Linda:

TWA's Recruiting Teams have been screening and interviewing thousands of candidates each week for the past several months. It is because of this that TWA has to be extremely selective in its Flight Attendant Recruitment.

Based upon your 288, the group interview data and your recent preliminary interview, the decision not to consider you further for the Flight Attendant position was a difficult one. There is no easy way to explain this decision other than to reemphasize TWA's need to apply the same criteria fairly and honestly to each applicant. In so doing we still find many qualified applicants. From these, TWA must identify those candidates close to the ideal Flight Attendant profile.

Please know that we understand how this letter is a disappointment to you. Hopefully you will allow it to fuel future career efforts within TWA.

On behalf of the entire Inflight Services Recruiting Staff, I'd like to thank you for your interest in the Flight Attendant position and your dedication to TWA.

Sincerely,

/s/ STEPHEN GIANOTTI
Stephen Gianotti, Supervisor
Flight Attendant Recruitment

SG/rjl

Appendix G

Chart of Elections Held by NMB in Passenger Service Craft or Class, 1977–1988 to Date

	carrier	no. of eligible employees	union certified	application dismissed for failure of majority to vote
1.	United	8,140		6 NMB No. 911
2.	Allegheny	2,464		6 NMB No. 1088
3.	American	6,067		6 NMB No. 1200
4.	TWA	5,170		6 NMB No. 1204
5.	Air New England	137	6 NMB No. 1218	
6.	Iran National	31	7 NNM No. 124	
7.	Singapore	46		7 NMB No. 127
8.	Japan	443		7 NMB No. 159
9.	South African	31		7 NMB No. 214
10.	Laker	180		8 NMB No. 107
11.	Cascade	129	8 NMB No. 168	
12.	TWA	4,882		8 NMB No. 214
13.	Sky West	44		9 NMB No. 31
14.	Big Sky	46		9 NMB No. 65
15.	Air Florida	536		9 NMB No. 92
16.	Singapore	99		9 NMB No. 99
17.	Southwest	616	9 NMB No. 127	
18.	Olympic	41		9 NMB No. 150
19.	Varig	126	10 NMB No. 83	
20.	United	8,560		10 NMB No. 121
21.	Rio	76		11 NMB No. 69
22.	British Caledonian	118	11 NMB No. 22	
23.	Big Sky	48		12 NMB No. 46
24.	Alitalia	207	13 NMB No. 55	
25.	TWA [this case]	4,330	13 NMB No. 72	
26.	Eastern	10,967		13 NMB No. 102
27.	Pan Am Express	51	14 NMB No. 33	
28.	Continental	2,592		14 NMB No. 36
29.	Air Jamaica	73	15 NMB No. 26	
	total no of eligible employees	56,250	(5,700 employees)	(50,550 employees)

Supreme Court, U.S.
FILED
JUN 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1918

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

NATIONAL MEDIATION BOARD, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DEBORAH BOLLER, *ET AL.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONSE OF INDIVIDUAL RESPONDENTS BOLLER, *ET AL.* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

MICHAEL ERNEST AVAKIAN
Center on National Labor Policy, Inc.
5211 Port Royal Road, Suite 400
North Springfield, Virginia 22151
(703) 321-9180

Attorney for Individual Respondents

QUESTION PRESENTED

Whether judicial review under Section 2, Ninth of the Railway Labor Act attaches to a certification in which the National Mediation Board deliberately disenfranchises 302 eligible employees in order to ensure unionization of the carrier because, as the court of appeals decided, the National Mediation Board is authorized under the Act to engage in non-neutral election activities.*

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*Respondents here are TWA passenger service employees Deborah K. Boller, Daniel W. Asplund, Lucy M. Houston, and William E. Craig.

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IN THE
SUPREME COURT OF THE UNITED STATES

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

NATIONAL MEDIATION BOARD, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DEBORAH BOLLER, ET AL.,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Respondents Deborah K. Boller, Daniel W. Asplund, Lucy M. Houston and William E. Craig respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above styled case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 839 F.2d

809 (D.C. Cir. 1988). The opinion of the United States District Court for the District of Columbia is reported at 654 F.Supp. 447 (D.D.C. 1987). The Determination of Eligibility-Order of the National Mediation Board is reported at 13 N.M.B. No. 63 (1986).

JURISDICTION

Respondents accept Petitioner's statement of the Court's jurisdiction.

STATUTES INVOLVED

Respondents accept Petitioner's statement of the statutes involved under the Railway Labor Act, 45 U.S.C. §151 et. seq.

INTRODUCTION

The individual respondents here, all Texas residents, filed a complaint, prior to the action filed by TWA, in the United States District Court for the Southern District of Texas on June 10, 1986.[1] That

---

[1]The original complaint was filed by Deborah K. Boller and Thomas R. Rhodes.
(continued...)

case was consolidated with TWA's complaint and transferred, over the objection of respondent Boller and TWA, to the United States District Court for the District of Columbia. Boller v. National Mediation Board, 647 F.Supp. 1060 (S.D.Tx. 1986). The District Court ruled that the Board had not acted in gross disregard of the individual respondents' rights, ordered TWA to treat with the union, and issued an injunction prohibiting TWA from implementing any unilateral changes in working conditions of the passenger service employee craft or class without the union's concurrence. Both TWA and the individual respondents filed separate appeals on the merits from the district court's decision. (J.A. 688, 691). Those appeals were consolidated by the court of appeals and dis-

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[1](...continued)
Shortly after the filing, Mr. Rhodes died (R-18; J.A. 3) and the other individual respondents were added. (R-18, J.A. 11).

posed of concurrently.

REASONS FOR GRANTING THE WRIT

Petitioner correctly points out first, that the circumstances surrounding the decision-making process of the Board in the present case, raises a specific issue of whether the Board's exercise of non-neutrality in order to influence the outcome of the election is authorized by the Act. Second, petitioner shows that the Board's decree that the individual respondents here and their fellow passenger service employees who chose to assist TWA during the flight attendants strike were working permanently outside the craft or class, and not on temporary assignment, is legally erroneous.

1. In Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297 (1943) ("Switchmen"), this Court considered the statutory question whether jurisdiction to review "suits and proceed-

ings arising under any law regulating commerce," 28 U.S.C. §41(8) [now 28 U.S.C. §1337(a)], allowed judicial review of a Board certification that described the perimeters of a collective-bargaining unit: "what is the appropriate craft or class in which the election should be held." 320 U.S. at 301. Yet, the Court also concluded in Switchmen, from its previously decided cases, that there is a strong inference of general jurisdiction in the federal courts where a right created by Congress might be obliterated. "In those cases, it was apparent that but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act." 320 U.S. at 300.

In deciding that the job descriptions to be joined together for the craft or class designation would reside solely with

the Board, the Court noted that this was not a case where "the 'right' of collective bargaining without a legal sanction would rob the Act of its vitality and thwart[ed] its purpose," but rather, that "[s]uch considerations are not applicable here." Id. Moreover, the Court observed that "[a]ll constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced." 320 U.S. at 301.

The Court construed that "§2, Fourth unites into law the 'right' of the 'majority of any craft or class of employees' to determine who shall be the representative of the class or craft for the purposes of this Act." 320 U.S. at 300-01. In the exercise of this right, the Court stressed the nature of the neutrality which the Board was to take in these matters, at several points in Switchmen, by citing to the statement of Commissioner Eastman

"that it was very important 'to provide a neutral tribunal which can make the decision and get the matter settled,'" 320 U.S. at 303, and by stating that "[t]he function of the Board under §2, Ninth is more the function of a referee." 320 U.S. at 304. Hence, the Court in resolving the discretionary nature of the crafts or classes selected by the Board did not need to implicate the question whether the lack of judicial review in the matter would endorse a loss of employee statutory rights and thus, "[w]e need not determine the full reach of that rule." 320 U.S. at 303.

In Brotherhood of Railway and Steamship Clerks v. Association for the Benefit of Non-Contract Employees, 380 U.S. 650 (1963), the Court reaffirmed the Board's duty that it "perform the 'function of a referee.'" 380 U.S. at 667. In determining whether that function was fulfilled in

the case, viz, the duty to investigate the dispute under §2, Ninth, the Court engaged in a thorough inquiry into how the Board's craft or class determination developed in the case consistent with its industry experience with other carriers. The case might have turned out differently, if in the Board's duty to investigate, it had failed to determine the underlying facts of the matter, as it had failed to do in Virginia Ry. Co. System Federation No. 40, 300 U.S. 515 (1937), thus leaving "the omitted fact open to inquiry." 300 U.S. at 562. Non-Contract, 380 U.S. at 661 n.2.

In the case at bar, there is an uncontested affidavit in the record by a member of the bar of this Court, that the Board's mediator, on the day the mail-in ballots were impounded, stated that "we know what ballots we have." (155a). Moreover, the Teamsters were explained by

the Board's mediator to be "pressuring the Board." (155a-56a). On the basis of these uncontested facts, the Board could know in advance that any decision concerning the eligibility of the contingent flight attendants raised by the Teamsters would be outcome determinative.[2]

Petitioner attempted to obtain answers to interrogatories (124a) which might unravel the puzzling Board action, but the district court refused to permit the discovery. (20a n.4). Similarly, the individual respondents were denied the opportunity to depose Mediator Anderson which would have either corroborated the issue

---

[2]The Board was advised of the number of bargaining unit employees by petitioner prior to the election. Under the Board's rules, a majority of employees must return ballots in order to certify the election. At the time of the eligibility decision, the Board must have known that a majority of employee ballots had not been returned, since it maintains custody of the ballots. Therefore, by eliminating a class of eligible employees, a majority response could be created to ensure unionization.

of outside interference and non-neutrality or enabled the Board to move for summary judgment on that question. Neither opportunities were made available to the parties and the record accordingly remains equivocal.[3]

The shadow of impropriety cast on these proceedings involving employee exercise of §2, Fourth rights, do not fade from judicial review simply because the

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[3]The National Labor Relations Board would not tolerate any such appearance of impropriety in the conduct of its elections. In Hudson Aviation Systems, Inc., 288 N.L.R.B. No. 94 (April 29, 1988), the Board recently overturned an election won by the union (26-5), because the Board agent at the polling area engaged in a "loud argument" with an assistant manager which "communicated the impression that the Board was displeased with and was criticizing the employer's assistant manager and, thereby undermined the indispensible perception of Board neutrality in the election." Hence, the National Labor Relations Board refuses to certify election results where actions destroy confidence in its election process or reasonably could be interpreted as impugning the standards of integrity and neutrality which the Board seeks to maintain in elections. Id. at n.4.

case involves the NMB. But, the court of appeals countenanced the activities by holding "there is no express duty of neutrality" in the Act because "[t]he word neutral does not occur as an adjective modifying the Board itself." (5a). This interpretation of the Board's non-neutral duty to investigate is claimed without a basis in this Court's precedent. As set out above in Switchmen's, this Court plainly considered the Board a neutral referee in cases arising under the RLA, not a proponent agency for any party. The Circuit Court's rendition that the Board was not constrained to be non-neutral (5a) and invention of the "gross violation of the statute" standard of review similarly are not grounded in any ruling enunciated by this Court.

3. Petitioner also correctly demonstrates that the Board's underlying decision that the contingent flight atten-

dants, such as Boller, Asplund and Craig, were not on limited temporary duty for TWA but were working permanently outside the craft or class of passenger service employees, renders the Board's decision in the matter contrary to the undisputed facts.

The court of appeals correctly understood that the individual plaintiffs were not on permanent assignment as flight attendants and that the facts of the case simply don't support any conclusion that the flight duty was anything else but temporary in nature:

> The employees in question, including individual plaintiffs in this action, were concededly on temporary assignment as flight attendants. All were regularly employed as passenger service employees within the bargaining unit relevant to the controversy out of which the disputed election arose. As passenger service employees, they enjoyed higher wages than flight attendants and accepted volunteer assignments after TWA's announcement that they would retain their current job title, salary, benefits, status, and seniority.

(3a)(emphasis added).

The court of appeals then itself distinguished the prior Board decision in Trans World Airways, Inc. 8 N.M.B. 663 (1981), which the Board "purportedly" relied upon to disenfranchise the 302 workers. The court noted that in the above cited case, the employees "were actually on permanent assignment . . . not paralleled by the concededly temporary flight service attendants who desired to vote on the craft or class of their regular employment" here. (3a-4a).

The court of appeals also noted the inconsistency of the Board's eligibility order in the case at bar with Section 5.302 of its representation manual that temporary status does not accrue to "employees who are regularly working" elsewhere for the same carrier. (4a). To these matters of fact, the court found that "[c]ertainly, their argument is an

appealing one. Unfortunately for plaintiffs, both the District Court and this Court are without the power to grant the relief prayed. Judicial review of NMB decisions is one of the narrowest known to the law." (4a-5a).

In basing its abdication of judicial review in this case on Non-Contract Employees and Switchmen's the court of appeals misreads this Court's decision in a manner distinctly at odds with the intent not to rob the Act of its vitality and purpose by denying general jurisdiction where the great "right" of majority rule has been compromised. Switchmen's 320 U.S. at 300. The court of appeals recognized the intrusion the decision had on majority rights when it noted that "the treatment of these employees certainly does not cast the NMB in a very favorable light. . . ." (6a).

Especially disturbing for employees

in this industry is the court of appeals' invitation to the Board to actively meddle in the exercise of employee rights in future election cases for "there is no express statutory duty of neutrality, even if plaintiffs' complaints were taken to adequately allege a violation of such duty." (5a)(emphasis added). This situation, the court of appeals so states, would "not disclose a 'gross violation of the statute'" either. Id. Such a statement of law cannot be permitted to authorize a federal agency to whimsically deny express statutory rights unless Congress' decision to give it the power to do so is absolutely clear. The court of appeals decision in this manner represents a grave threat to the exercise of employee statutory rights under Section 2, Fourth of the Railway Labor Act.

CONCLUSION

For the reasons set out above, this Court should grant the petition.

Respectfully submitted,

Michael E. Avakian
Center on National Labor
Policy, Inc.
4211 Port Royal Road, Suite 400
N. Springfield, VA 22151
(703) 321-9180

Attorney for Individual
Respondents

June 13, 1988

Supreme Court, U.S.
FILED
JUL 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

(3) (2)

Nos. 87-1918 and 87-2101

In the Supreme Court of the United States

OCTOBER TERM, 1988

TRANS WORLD AIRLINES, INC, PETITIONER

v.

NATIONAL MEDIATION BOARD, ET AL.

DEBORAH K. BOLLER, ET AL., CROSS-PETITIONERS

v.

NATIONAL MEDIATION BOARD, ET AL.

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
JOHN R. BOLTON
Assistant Attorney General
JOHN F. CORDES
MARK W. PENNAK
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the court of appeals properly held, in accordance with this Court's decisions in *Brotherhood of Ry. & S.S. Clerks* v. *Association for the Benefit of Non-Contract Employees,* 380 U.S. 650 (1965), and *Switchmen's Union* v. *National Mediation Bd.,* 320 U.S. 297 (1943), that the National Mediation Board's decision that certain of petitioner's employees were ineligible to vote in a representation election conducted under the Railway Labor Act, 45 U.S.C. 151 *et seq.*, is not subject to judicial review.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1918

TRANS WORLD AIRLINES, INC, PETITIONER

v.

NATIONAL MEDIATION BOARD, ET AL.

No. 87-2101

DEBORAH K. BOLLER, ET AL., CROSS-PETITIONERS

v.

NATIONAL MEDIATION BOARD, ET AL.

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a)[1] is reported at 839 F.2d 809. The opinion of the district court (Pet. App. 14a-29a) is reported at 654 F. Supp. 447. The decisions of the National Mediation Board (Pet. App. 30a-44a) are reported at 13 N.M.B. Nos. 63, 64 and 72.

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[1] Pet. App. refers to the petitioner's appendix in No. 87-1918.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 1988. The petition for certiorari in No. 87-1918 was filed by petitioner Trans World Airlines, Inc. (TWA), on May 19, 1988. The cross-petition for certiorari in No. 87-2101 was filed by cross-petitioners Deborah Boller, et al., on June 23, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Railway Labor Act, 45 U.S.C. 151 *et seq.*, creates a statutory plan for the administrative resolution of labor-management disputes in the rail and air transportation industries. See 45 U.S.C. 151a. To this end, the Act requires that carriers and their employees "exert every reasonable effort to make and maintain agreements * * * and to settle all disputes * * * in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof" (45 U.S.C. 152 First).

The Act specifically guarantees employees "the right to organize and bargain collectively through representatives of their own choosing" (45 U.S.C. 152 Fourth). The Act further provides that the "majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter" (45 U.S.C. 152 Fourth). The representative so selected is the exclusive bargaining representative of all the employees of that craft or class, and the carrier is obligated to enter into negotiations with that representative for the settlement of labor disputes. See 45 U.S.C. 152 First and Ninth. See also *Virginian Railway Co.* v. *System Fed'n No. 40*, 300 U.S. 515, 548 (1937).

Section 2, Ninth of the Railway Labor Act authorizes the National Mediation Board to resolve labor representation disputes (45 U.S.C. 152 Ninth). A party that wishes to be certified as a bargaining representative of a craft of a carrier's employees may apply to the Board for an investigation to determine the craft's representation wishes. Section 2 Ninth does not specify the method that the Board must use in conducting an investigation; instead, it authorizes the Board either "to take a secret ballot of the employees involved" or "to utilize any other appropriate method of ascertaining" the representative (45 U.S.C. 152 Ninth). It also provides that "[i]n the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election" (45 U.S.C. 152 Ninth). Section 2 Ninth further directs the Board to determine the wishes of the employees "in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier" (45 U.S.C. 152 Ninth).

If the Board conducts a representation election and the election results in the choice of a representative, the Board certifies the elected individual or organization as the designated representative of the craft or class of the carrier's employees, and certifies "the same to the carrier" (45 U.S.C. 152 Ninth). A representative will be certified by the Board only if a majority of the eligible voters cast ballots favoring representation and one potential representative receives a majority of the valid ballots cast.

2. In January 1986, the International Association of Machinists and Aerospace Workers (Machinists), the International Brotherhood of Teamsters (Teamsters), and the Independent Federation of Flight Attendants (IFFA) filed separate applications with the Board pursuant to Section 2 Ninth of the Act, requesting the Board to investigate

the representation of the "passenger service employees" at TWA. The Board commenced an investigation, appointed a mediator, and authorized a mail ballot election. While these Board proceedings were pending, another category of TWA employees, flight attendants, went on strike. In response, TWA assigned numerous passenger service employees, who volunteered, to work as flight attendants for the duration of the strike. This case involves the eligibility of 302 of these so-called "contingent flight attendants" to participate in the Board's passenger service employees representation election. See Pet. App. 3a-4a, 16a-17a, 30a-31a.

The mediator initially determined that these contingent flight attendants were eligible to vote in the election for the passenger service employees representative, and the Teamsters appealed this eligibility determination to the National Mediation Board (Pet. App. 3a-4a, 16a-17a).[2] The Board held (Pet. App. 30a-38a) that the 302 employees were ineligible to vote within the craft or class of passenger service employees, citing (*id.* at 35a) its prior decisions in *Chicago & N. W. Ry.*, 4 N.M.B. 240 (1965), and *Trans World Airways, Inc.*, 8 N.M.B. 663 (1981). See Pet. App. 30a-38a. Shortly thereafter, the Board issued its decision concerning the representation dispute (*id.* at

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[2] Both TWA and the other unions – the IFFA and the Machinists – opposed the Teamsters' appeal and agreed with the mediator that passenger service employees working temporarily as flight attendants should be allowed to vote.

42a-44a). The election yielded the following results (*id.* at 43a):

Number of eligible employees:	4330
Ballots cast:	
Machinists:	1279
Teamsters:	935
IFFA:	36
Void ballots:	22

A majority of the eligibile employees voted in the election, and the Machinists received a majority of the valid ballots that were cast. The Board accordingly certified the Machinists as the representative of TWA's passenger service employees (*id.* at 42a-44a).

3. TWA brought suit in the United States District Court for the Southern District of Texas to challenge the Board's certification order and to set aside the representation election on the ground that the Board improperly excluded from participation the 302 temporary flight attendants. Several TWA employees (the cross-petitioners) joined TWA's efforts by filing a separate action in the district court. These suits were eventually transferred to and consolidated in the United States District Court for the District of Columbia (Pet. App. 15a-16a & n.1), which dismissed them for lack of subject matter jurisdiction (*id.* at 14a-29a). The court explained (*id.* at 17a):

> It has been established for over 20 years that courts have no authority to review NMB certification decisions in the absence of a showing on the face of the pleadings that the certification decision was a gross violation of the Railway Labor Act or that it violated the constitutional rights of an employer, employee or union.

The court relied on *Brotherhood of Ry. & S.S. Clerks* v. *Association for the Benefit of Non-Contract Employees,*

380 U.S. 650 (1965) (*Railway Clerks*), and *Switchmen's Union* v. *National Mediation Bd.*, 320 U.S. 297 (1943) (*Switchmen's Union*), as well as other decisions. The court concluded (Pet. App. 17a) that "plaintiffs have failed to demonstrate either a gross violation of the Act or any violation of the Constitution."

The court of appeals affirmed the district court's decision (Pet. App. 3a-6a), noting that "[j]udicial review of NMB decisions is one of the narrowest known to the law" (*id.* at 4a-5a).[3]

ARGUMENT

The court of appeals' decision is correct and, indeed, is mandated by this Court's decisions in *Railway Clerks* and *Switchmen's Union*. It does not conflict with any decision of this Court or another court of appeals. Accordingly, there is no warrant for further review.

1. Congress has vested the National Mediation Board with plenary authority to resolve representation disputes under the Railway Labor Act and to protect the employees' statutory right under Section 2 Ninth to elect a bargaining representative. See 45 U.S.C. 152 Ninth. This Court has twice recognized in no uncertain terms that Congress intended the Board—and not the judiciary—to

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[3] The court of appeals consolidated TWA's and the cross-petitioner's appeals with a third appeal, from a separate case, in which the Machinists argued that the Railway Labor Act requires TWA to maintain existing working conditions while bargaining with the union. See Pet. App. 1a-3a, 14a-16a & n.1. The Machinists have filed a petition for a writ of certiorari seeking review of the court of appeals' ruling in that appeal. See *International Ass'n of Machinists & Aerospace Workers* v. *Trans World Airlines, Inc.*, No. 87-2069. The National Mediation Board was not a party in the Machinists' action against TWA and is therefore not a respondent to the Machinists' petition.

have the final word in resolving representation questions. As the Court explained, " 'the intent seems plain—the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law.' " *Railway Clerks,* 380 U.S. at 659 (quoting *Switchmen's Union,* 320 U.S. at 305). The court of appeals was unquestionably correct in holding that "under the principles set forth in *Switchmen's Union* * * * the certification of the [Machinists] as bargaining representative is not reviewable" (Pet. App. 6a). The courts of appeals have uniformly adhered to the principle that Board certification decisions are not subject to judicial review.[4]

This Court did recognize in *Railway Clerks* that while Congress precluded judicial review of Board representation decisions, the courts may afford a remedy for " 'an order of the Board made in excess of its delegated powers and contrary to a *specific prohibition in the Act.*' " 380 U.S. at 659-660 (emphasis in original) (quoting *Leedom* v.

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[4] See, *e.g., Zantop Int'l Airlines, Inc.* v. *National Mediation Bd.,* 732 F.2d 517 (6th Cir. 1984); *British Airways Bd.* v. *National Mediation Bd.,* 685 F.2d 52 (2d Cir. 1982); *Sedalia-Marshall-Boonville Stage Line, Inc.* v. *National Mediation Bd.,* 574 F.2d 394, 397-399 (8th Cir.), cert. denied, 439 U.S. 881 (1978); *International Ass'n of Machinists & Aerospace Workers* v. *National Mediation Bd.,* 425 F.2d 527, 535-536 (D.C. Cir. 1970); *International Bhd. of Teamsters* v. *Brotherhood of Ry. Clerks,* 402 F.2d 196, 205 (D.C. Cir.), cert. denied, 393 U.S. 848 (1968); *Ruby* v. *American Airlines, Inc.,* 323 F.2d 248, 253-256 (2d Cir. 1963), cert. denied, 376 U.S. 913 (1964); *WES Chapter, Flight Engineers' Int'l Ass'n* v. *National Mediation Bd.,* 314 F.2d 234, 236-237 (D.C. Cir. 1962); *Decker* v. *Venezolana,* 258 F.2d 153, 154 (D.C. Cir. 1958); *Rutas Aereas Nacionales, S.A.* v. *Edwards,* 244 F.2d 784, 785 (D.C. Cir. 1957); *American Air Export & Import Co.* v. *O'Neill,* 221 F.2d 829, 830 & n.4 (D.C. Cir. 1954); *Brotherhood of Ry. & S.S. Clerks* v. *Atlantic Coast Line R.R.,* 201 F.2d 36, 38-39 (4th Cir.), cert. denied, 345 U.S. 992-993 (1953).

Kyne, 358 U.S. 184, 188 (1958)). But TWA and the cross-petitioners have failed to state a claim within the " 'narrow limits' " (380 U.S at 660 (citation omitted)) of that rule. Section 2 Ninth authorizes the Board to "designate who may participate in the election and establish the rules to govern the election" (45 U.S.C. 152 Ninth), thus leaving to the Board "the task of selecting the methods and procedures which it should employ" (380 U.S. at 662). The Board acted wholly within that broadly conferred discretion by concluding that, under the facts of this case, passenger service employees acting as "contingent flight attendants" had a " 'present interest in [the] craft or class' " of flight attendants and were therefore outside the passenger service class or craft (Pet. App. 35a (citation omitted). The Board's conclusion did not violate any "specific prohibition" of the Act. Here, as in *Railway Clerks,* the Board's "decision on the matter is not subject to judicial review where there is no showing that it has acted in excess of its statutory authority" (380 U.S. at 669).

TWA and cross-petitioners also contend (Pet. 25; Cross-Pet. 16) that the Board demonstrated a pro-union bias. But as the court of appeals explained, those allegations also fail to state a claim actionable under *Railway Clerks* because "there is no express statutory duty of neutrality, even if plaintiffs' complaints were taken to adequately allege a violation of such duty" (Pet. App. 5a (footnote omitted)). The district court reached the same conclusion. See *id.* at 19a ("It is unclear whether a proven instance of 'non-neutrality' would constitute a gross violation of a specific provision of the Railway Labor Act * * *. There is no occasion to decide that question, however, because [TWA and cross-petitioners] have failed to proffer any substantial evidence to support [that] claim.").

TWA's other allegations have likewise been rejected by the lower courts. The court of appeals and district court both agreed (*id.* at 5a, 17a-20a) that the pleadings failed to disclose any other Board action that would amount to the sort of "gross violation" of the Act contemplated in *Railway Clerks.* Certainly, this Court does not sit to review whether the two courts correctly decided that factbound issue.[5]

2. TWA strives mightily—primarily by snatching passages out of context and arguing broad generalities concerning labor policy (Pet. 21-29)—to suggest that the court of appeals' decision is in conflict with *Railway Clerks* or *Switchmen's Union.* No such conflict exists. Indeed, TWA's protracted and convoluted arguments simply prove the wisdom of Congress's decision to curtail judicial review of representation decisions, "for it was to avoid the haggling and delays of litigation that such questions were left to the Board" (*Railway Clerks,* 380 U.S. at 671). Similarly without merit is TWA's argument that the decision below conflicts with the Fifth Circuit's decision in *Russell* v. *National Mediation Bd.,* 714 F.2d 1332 (5th Cir. 1983), cert. denied, 467 U.S. 1204 (1984). In *Russell,* the

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[5] There is also no merit to TWA's contention (Pet. 29-30) that it was entitled to conduct discovery concerning its various allegations. Judicially supervised discovery would impose burdensome and time-consuming demands upon the Board and the parties and thus substantially delay a process that Congress intended to take place swiftly and without delay. See *Switchmen's Union,* 320 U.S. at 305. Thus, the courts have denied discovery requests. See *Sedalia-Marshall-Boonville Stage Line, Inc.* v. *National Mediation Bd.,* 574 F.2d 394, 399 (8th Cir.), cert. denied, 439 U.S. 881 (1978) (holding that since "sufficient facts" appeared of record to sustain the district court finding that the Board did not "abrogate a statutory duty," the court would "not consider the allegation that the district court erred in not enforcing discovery against the Board").

Board refused to investigate an individual's application to become the representative of a craft or class of workers of a carrier because it considered his application a subterfuge. The Fifth Circuit held "that the Board breached its clear statutory mandate by not 'processing' Russell's application for investigation into the representational dispute" (714 F.2d at 1341). As we explain above, TWA failed to show that the Board breached any statutory duty here. Certainly, it is indisputable that the unions' applications for investigations of the representation dispute were processed in this case.

CONCLUSION

The petition and cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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